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THE EFFECTIVE DETERRENCE OF ENVIRONMENTAL  
DAMAGE DURING ARMED CONFLICT:  
A CASE ANALYSIS OF THE PERSIAN GULF WAR

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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**ABSTRACT:** An examination of the environmental damage during the recent Persian Gulf War provides a framework to conclude that the existing international legal order clearly proscribes environmental damage that is not justified by military necessity during armed conflict. It is equally clear, however, there is no institutionalized mechanism at the international level which strengthens deterrence by facilitating individual and State accountability for even the most flagrant violations of the law. This study proposes a system to strengthen the ability of the international community to take action, and proposes a stronger role for the United States until the world community develops a more effective system of redress.

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I. INTRODUCTION

*For the true servants of the Most Gracious are those who tread gently on the earth.*<sup>1</sup>

*al Qur'an 25:63*

Post conflict periods have always been a time for an examination of the international legal norms that govern the initiation and conduct of hostilities.<sup>2</sup> While such scrutiny is necessary for the law to mature, it is counterproductive<sup>3</sup> to assume that the existing normative legal structure is weak, and therefore the cause of the conflict or of some atrocity committed during the conflict.<sup>4</sup> The fallacy of this assumption is immediately apparent in recognizing that the United Nations Charter clearly prohibited,<sup>5</sup> but did not prevent, Saddam Hussein's invasion of Kuwait on August 2, 1990.<sup>6</sup> A thorough examination of the legal order which proscribes environmental damage during armed conflict should therefore look at the dynamics of deterrence in addition to a qualitative analysis of the proscriptive nature of applicable law.<sup>7</sup>

Saddam Hussein inflicted unprecedented environmental damage on the Persian Gulf region.<sup>8</sup> This extensive environmental damage was a focal point,



if not a rallying cry, for various organizations to advocate a Fifth Geneva Convention which in their view would protect the environment from the effects of war. Part VII, *infra*, discusses how this proposed convention fails to accomplish its goal.

The recent Persian Gulf War and the subsequent response of the international community will serve as a model for evaluating the adequacy and deterrent value of the existing legal framework which proscribes environmental damage during armed conflict. The propriety of recent proposals which purport to strengthen the international legal order will also be analyzed. This analysis provides a framework to conclude that the current legal order clearly proscribes environmental damage that is not justified by military necessity during armed conflict; however, it is equally clear there is no institutionalized mechanism at the international level which strengthens deterrence by facilitating individual and State accountability for even the most flagrant violations of law. This study proposes a system to strengthen the ability of the international community to take action, and proposes a stronger role for the United States until the international system develops a more effective system of redress.

It is important to realize before proceeding that one delimitation of this paper is that it only addresses armed conflict of an international character. This is done intentionally for several reasons. First, the fundamental

principles which prohibit environmental damage during armed conflict are those of the law of war, which generally apply only during international armed conflict and not internal conflicts.<sup>9</sup> Second, environmental damage during an internal conflict is already governed by the broader peacetime (in an international sense) regime that protects the environment and governs trans-boundary pollution issues. This peacetime regime will govern the State within which the internal conflict occurs by limiting the State's conduct which affects the environment. The actions of the insurgent group should then be treated as a criminal matter under domestic law. In contrast, that part of this peacetime regime that relates to the kind of catastrophic environmental damage which occurred during the Persian Gulf War will be addressed in parts III and VI, *infra*. This regime is important because the applicability of peacetime norms is not automatically terminated by armed conflict.<sup>10</sup>

## II. THE DYNAMICS OF DETERRENCE

*The real lesson . . . was not that "law" was ineffective, but rather that unenforced law is ineffective.*<sup>11</sup>

*Robert F. Turner, Professor of Law  
University of Virginia School of Law*

### A. The Critical Necessity for Deterrence

Twentieth century technology demands that we meet its potential destructive forces with an overwhelming deterrent. The Persian Gulf War was unprecedented in its "intensity, precision, and lethality," and "in the

amount of destruction inflicted on a nation with conventional weapons in so short a period of time."<sup>12</sup> If we do not actively seek to deter aggression and violations of the laws of armed conflict, or if we fail to condemn aggression and prosecute war crimes, then we merely invite future wars and war crimes. In confronting the potential destructive force of today's technology, that is a risk the international community should be unwilling to hazard.

This study will not examine the illegality of the initial use of force by Iraq, or other violations of international law such as terrorism; however, the principles of deterrence are equally applicable to these issues. The conclusions and recommendations in this study are therefore transferable to a larger continuum of violations of international law than just environmental damage during armed conflict.

#### B. The Principles of Deterrence

The deterrent effect of principles is not coextensive with the principles of deterrence. Simply having a normative international legal order which prohibits environmental damage is insufficient to deter violations of those norms.<sup>13</sup> Indeed, the existence of proscriptive norms which are not enforced undermines the value of the entire legal system. Even a brief discussion of deterrence and its relationship to all aspects of a national foreign policy is far beyond the scope of this study; however, effective deterrence within the context of a model legal system is comprised of three indispensable elements.

First, the fundamental cornerstone of deterrence is a set of clear proscriptive norms. A qualitative analysis of the existing international legal framework which proscribes environmental damage during armed conflict will follow in part III, *infra*.

Second, these proscriptive norms must be built upon by an established mechanism which facilitates individual and State accountability for violations of those norms. Parts IV and V, *infra*, will discuss the existing international system which provides for individual and State accountability, respectively.

Third, the world community's demonstrated commitment to consistently and unequivocally condemn all violations of these proscriptive norms is the capstone which completes this deterrence structure. Without this capstone, proscriptive norms and organizations are without effect, *i.e.*, "unenforced law is ineffective." Part VI, *infra*, will evaluate the world community's response to the environmental damage during the Persian Gulf War. The Persian Gulf War reflects an unprecedented unification of world opinion and should therefore give insight into how the existing system works at its maximum potential. One response of the world community was to suggest that environmental damage is not adequately proscribed, and that a new convention protecting the environment during armed conflict is necessary. Part VII, *infra*, will evaluate the propriety of this proposal. The remainder of this study will advocate that the way to proscribe environmental damage

during future armed conflicts is to strengthen the deterrence structure by creating a mechanism which facilitates condemnation and accountability.

### III. THE EXISTING LEGAL FRAMEWORK PROSCRIBING ENVIRONMENTAL DAMAGE DURING ARMED CONFLICT

*nullum crimen sine lege --*

*there is no crime unless there is a law*<sup>14</sup>

The "common will of States" is the only source of international law.<sup>15</sup> International conventions are the best evidence of the will of States, and thus are considered the primary source of international law.<sup>16</sup> Although binding only on signatories,<sup>17</sup> conventions that receive longstanding and widespread acceptance may become customary international law, and therefore be binding as customary law on States not signatories.<sup>18</sup> The secondary source of international law is "international custom, as evidence of a general practice accepted as law,"<sup>19</sup> and is applicable to all nations.<sup>20</sup> In the absence of applicable international conventions and customary international law, the general principles of law recognized by civilized nations are used to fill the gaps in international law.<sup>21</sup>

#### A. Relevant International Conventions

Although this study only addresses the proscription of environmental damage during armed conflict, it includes proscriptions that are drafted generally for peacetime situations. This is necessary because armed conflict

does not automatically terminate the obligations of a treaty during the conduct of hostilities.<sup>22</sup> Each treaty must be looked at individually to determine its applicability during hostilities. Armed conflict does, however, invoke the parameters of certain norms that govern the conduct of hostilities that are not applicable during peacetime.<sup>23</sup> These norms, *jus in bello*, can be referred to interchangeably as the "laws of armed conflict" or the "laws of war."<sup>24</sup> The purpose of these laws "is to ensure that the violence of hostilities is directed toward the enemy's forces and is not used to cause purposeless, unnecessary human misery and physical destruction."<sup>25</sup>

International humanitarian law of armed conflict has generally developed in two interrelated groups of conventions.<sup>26</sup> The first group consists of the Hague Conventions which concern the rules relating to the methods and means of warfare; and, the second group consists of the Geneva Conventions which concern the victims of war.

There are numerous international conventions that pertain to the proscription of environmental damage during peacetime and armed conflict. The most significant of these conventions will be discussed in this study. The methodology of inquiry will be to describe the origin and purpose of the convention, and then to discuss to what extent and in what manner it proscribes environmental damage during periods of armed conflict. The convention's impact on limiting a State's ability to wage war, and its scheme,

if any, to impose sanctions are also important considerations that will be addressed. Although the discussion at this phase of the study will be generic in nature, its scope will be limited to conventions applicable to the environmental damage during the Persian Gulf War.

1. The 1907 Hague Convention No. IV

- a. Historical Perspective

The Hague series of conventions and declarations began in 1899 at the initiative of Tsar Nicholas II of Russia for the purpose of limiting armaments.<sup>27</sup> The "First Hague Peace Conference" resulted in the adoption of three conventions, which are still sound principles of international law but have been superseded for the most part by later agreements.<sup>28</sup> The second of these three conventions, the 1899 Hague Convention No. II, concerned the laws and customs of war on land, and included a series of regulations annexed to it that was the first successful effort to codify existing customary laws of war.<sup>29</sup>

The "Second Hague Peace Conference," which convened in 1907 at the initiative of President Theodore Roosevelt, resulted in the adoption of thirteen conventions.<sup>30</sup> One of these conventions, the 1907 Hague Convention No. IV, slightly revised and replaced the 1899 Hague Convention No. II, leaving the latter in force for its contracting States which did not ratify the new convention.<sup>31</sup>

b. Applicability

There is no debate that the 1907 Hague Convention No. IV applies during international armed conflict. Its entire negotiating history, text, and title clearly demonstrate that it applies during armed conflict between nations.<sup>32</sup> Article 2 of the 1907 Hague Convention No. IV is a "general participation clause,"<sup>33</sup> which states that it does not apply, however, "except between contracting Powers, and then only if all the belligerents are parties to the Convention."<sup>34</sup>

On October 18, 1907, the date of signature for the 1907 Hague Convention No. IV,<sup>35</sup> Iraq was still part of the Ottoman Empire and did not exist as an independent State.<sup>36</sup> The Ottoman Empire did not become a party State to the 1907 Hague Convention No. IV.<sup>37</sup>

As a result of the 1919 Paris Peace Conference, Iraq became a mandate entrusted to Britain and remained so until 1932.<sup>38</sup> A prerequisite condition to becoming an independent State and a member of the League of Nations on October 3, 1932, was for Iraq to give the following undertaking:

Iraq considers itself bound by all the international agreements and conventions, both general and special, to which it has become a party, whether by its own action or by that of the mandatory Power acting on its behalf. Subject to any right of denunciation provided for therein, such agreements and conventions shall be respected by Iraq throughout the period for which they were concluded.<sup>39</sup>

However, research does not reveal that Britain ever acceded to the 1907



Hague Convention No. IV on behalf of Iraq. Consequently, Iraq is not bound by the provisions of the 1907 Hague Convention No. IV.<sup>40</sup>

Iraq is nonetheless bound by the customary law embodied in the 1907 Hague Convention No. IV. The International Military Tribunal at Nuremberg expressly held that the 1907 Hague Convention No. IV was declaratory of customary international law.<sup>41</sup>

c. Environmental Proscriptions

The text of the 1907 Hague Convention No. IV is short, consisting of a preamble and only nine articles.<sup>42</sup> The preamble states that the contracting Parties intended "to diminish the evils of war, as far as military requirements permit," but did not intend that "unforeseen cases should . . . be left to the arbitrary judgment of military commanders."<sup>43</sup>

The core of this convention is its regulations.<sup>44</sup> These regulations were a codification of the laws and customs of war on land which existed in 1907, and were a product of a balancing between the principles of proportionality and targeting discrimination on the one hand, and a hostile State's necessity to obtain the partial or complete submission of its enemy on the other hand.<sup>45</sup> As a result of this balancing, some of the regulations clearly prohibit a given means or method, such as article 23(a) which states that it is "especially forbidden . . . [t]o employ poison or poisoned weapons."<sup>46</sup> Other regulations require further balancing, such as article 23(e) which prohibits the use of

"arms, projectiles, or material calculated to cause unnecessary suffering."<sup>47</sup>

The regulations, consisting of fifty-six articles, are found in the Annex to the 1907 Hague Convention No. IV.<sup>48</sup> Three articles of the 1907 Hague Regulations are applicable to the proscription of environmental damage during armed conflict. The first two are found in the chapter which limits the means used to injure the enemy, and the third article is found in the chapter which governs the law of occupation.

Article 22 of the 1907 Hague Regulations codifies the customary principle that is the very foundation of all of the laws of war.<sup>49</sup> It states "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."<sup>50</sup> This general principle is built upon by subsequent articles which place limits on sieges, bombardments, and specific means of injuring the enemy.<sup>51</sup>

Article 23 of the 1907 Hague Regulations states, in pertinent part:

In addition to the prohibitions provided by special Conventions, it is especially forbidden -- . . .

(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering. . .

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; . . .<sup>52</sup>

Although these provisions do not explicitly address environmental damage, they do protect the environment. Article 23(e) can be interpreted as prohibiting any destruction of the environment that will cause unnecessary suffering. With respect to protecting the environment, this provision is

narrow in scope and offers limited protection under most circumstances.

Article 23(g) prohibits any destruction of the enemy's property that is not imperatively demanded by the necessities of war. When one considers the environment in its component parts as property of the enemy,<sup>53</sup> this provision offers substantial environmental protection. This article utilizes the customary principles of military necessity and unnecessary suffering as tests for determining what means and methods of warfare are permissible. These two customary principles are discussed in greater detail in part III.B, *infra*.

Article 55 of the 1907 Hague Regulations specifically addresses the environment in its component parts. It states:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the Hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.<sup>54</sup>

Herein, usufruct means "the right of one state to enjoy all the advantages derivable from the use of property which belongs to another state."<sup>55</sup>

Although this article allows an occupying State the right to use and benefit from public buildings, real estate, forests, and agricultural estates, it does impose upon it the obligation to protect the environment. This article presupposes the existence of a state of occupation, therefore it does not address military necessity. If an armed conflict occurs or reoccurs within occupied territory, destruction is permissible if demanded by military

necessity.

d. Sanctions

Article 3 of the 1907 Hague Convention No. IV provides:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.<sup>56</sup>

Articles 53 and 56 of the 1907 Hague Regulations also make very weak references to compensation required in the case of seizures of state owned or personal property by an occupying State.<sup>57</sup>

Although this convention does not address individual criminal liability for a violation of its regulations, article 1 of the 1907 Hague Convention IV requires the contracting powers to train their armed land forces in the provisions of the 1907 Hague Regulations.<sup>58</sup> Article 1 of the 1907 Hague Regulations expressly imposes an obligation on the members of the land forces of contracting Parties to follow the laws, rights, and duties of war.<sup>59</sup>

e. Conclusions

The 1907 Hague Convention No. IV and its annexed regulations embody the laws and customs of war on land, therefore, the customary international law as represented by the Convention is binding on all States during armed conflict between nation States. Neither the 1907 Hague Convention No. IV nor its annexed regulations explicitly addresses damage to the environment

as a factor to be considered in a determination of the means or methods that can be legally utilized by a belligerent to injure its enemy. However, it does explicitly prohibit unnecessary suffering and the destruction of property not imperatively demanded by the necessities of war. It also imposes on an occupying State the obligation to protect real estate, forests, and agricultural estates. These prohibitions require a balancing of any destruction with the military requirements at hand, and are broad enough to encompass the use of any methods or means based on any existing or new technology. Furthermore, this Convention imposes upon an occupying force the duty to safeguard all property within the occupied State, and requires compensation to be paid for seizures; however, this convention does not provide for any criminal liability or any mechanism for enforcing its civil penalties. The determination of whether or not a given act is a violation of this Convention requires a fact intensive review on a case by case basis of the principles of unnecessary suffering and military necessity.

## 2. The Geneva Conventions

### a. Historical Perspective

This series of conventions began in 1864 with the first Geneva Convention on the wounded.<sup>60</sup> There were subsequent Geneva conventions and protocols that focused on humanitarian law in 1868,<sup>61</sup> 1906,<sup>62</sup> and 1929.<sup>63</sup> The 1929 Geneva Convention benefitted many during World War II, but

overall proved to be inadequate.<sup>64</sup> Consequently, out of a concern for more specific provisions to protect victims of war, four additional Geneva Conventions were signed in 1949 by sixty-four States.<sup>65</sup> These four conventions have been adhered to by more States than any other agreements on the laws of war, and deal with the wounded and sick in armed forces in the field; the wounded, sick, and ship-wrecked in armed forces at sea; the treatment of prisoners of war; and, the protection of civilians.<sup>66</sup>

In 1977, two Protocols Additional to the Geneva Conventions of 12 August 1949 were opened for signature.<sup>67</sup> The purpose of these Protocols was to reaffirm the earlier 1949 Geneva Conventions, and to develop areas of the law appropriate for the conditions of contemporary hostilities.<sup>68</sup> While both Protocols concern the protection of victims and were influenced by the law relating to human rights, the first regulates international armed conflicts and the second regulates non-international armed conflicts.<sup>69</sup> The two conventions relevant to this study are the fourth of the 1949 Geneva Conventions concerning the protection of civilians,<sup>70</sup> and the first of the 1977 Protocols.<sup>71</sup>

#### b. Applicability

As is the case with the 1907 Hague Convention No. IV, there is no debate that the 1949 Geneva Convention No. IV and the 1977 Geneva Protocol I apply during international armed conflict. The negotiating history, text, and title of both clearly demonstrate that they apply during armed

conflict between nations.<sup>72</sup> Unlike the Hague Convention No. IV, the Geneva Conventions do not contain a "general participation clause," and therefore are binding on parties engaged in a conflict even though one of the belligerents is not a party.<sup>73</sup>

Iraq acceded to the 1949 Geneva Convention No. IV on February 14, 1956.<sup>74</sup> This convention is also considered to be declaratory of customary international law.<sup>75</sup> Iraq did not, however, participate as a contracting State for the 1977 Geneva Protocol I.<sup>76</sup> Although currently in force for seventy-six States,<sup>77</sup> Iraq has not since acceded to the 1977 Geneva Protocol I;<sup>78</sup> however, articles 35(3) and 55 of this Protocol "may be at least the best evidence of customary international law rules for the protection of the environment during wartime."<sup>79</sup>

### c. Environmental Proscriptions

#### (1) 1949 Geneva Convention No. IV

Article 2 of the 1949 Geneva Convention No. IV states that it shall apply "to all cases of declared war or of any other armed conflict . . . [and] to all cases of partial or total occupation . . . even if the said occupation meets with no armed resistance."<sup>80</sup> Article 6 provides that the convention applies from the outset of any conflict to the general close of military operations, and in the case of occupied territory:

the application of the present convention shall cease one year after the

general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: . . . 53 . . .<sup>81</sup>

The applicable article in the 1949 Geneva Convention No. IV that protects the environment is article 53. Although this article does not specifically mention the environment, it offers specific, concrete protection to the environment by prohibiting the destruction of property. Article 53 provides:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.<sup>82</sup>

As did the 1907 Hague Convention No. IV, this article utilizes the customary principle of military necessity as a test for determining what means and methods of warfare are permissible. This customary principle is discussed in greater detail in part III.B, *infra*.

#### (2) 1977 Geneva Protocol I

Article 3 of this protocol states that it was intended to supplement the 1949 Geneva Convention No. IV, and that its applicability is coextensive with that of the 1949 Geneva Convention No. IV.<sup>83</sup> Two articles of the 1977 Geneva Protocol I are applicable to the proscription of environmental damage during armed conflict. The first is found in the section that limits the methods and means used to injure the enemy, and the second is found in the



section that protects the civilian population and its objects. They both specifically mention the environment, although they do not define the environment.

The first is article 35(3) of the 1977 Geneva Protocol I. It provides:

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.<sup>84</sup>

It is important to note that this provision prohibits "widespread, long-term and severe damage" to the environment regardless of the weapons used;<sup>85</sup> however, it does not define "widespread, long-term and severe damage."

The second is article 55. It provides:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.<sup>86</sup>

Neither of these articles set forth any workable standards for a commander in the midst of an armed conflict. Both articles are a prohibition of "widespread, long-term and severe damage," but neither articulates a threshold for prohibited environmental destruction. Article 55 states that care shall be taken to protect the natural environment, but what does "care shall be taken" mean? Not only is there no explanation, but "care shall be

taken" sounds like a far less stringent standard than destruction "imperatively demanded by the necessities of war"<sup>87</sup> or "rendered absolutely necessary by military operations."<sup>88</sup> However, article 57 provides that those in the attack shall:

refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>89</sup>

This latter provision incorporates the principle of military necessity into the 1977 Geneva Protocol I.

#### d. Sanctions

Article 147 of the 1949 Geneva Convention states that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Convention.<sup>90</sup> Article 146 acknowledges criminal responsibility of individuals for any violation of the Convention, and article 148 acknowledges civil liability of the State for grave breaches of the Convention.<sup>91</sup> The 1977 Geneva Protocol I sets up a similar scheme.<sup>92</sup> Article 85 of the 1977 Geneva Protocol I defines breaches in great detail. Article 85.3 enumerates six acts that are grave breaches if they cause death or serious injury and are done wilfully in violation of Protocol I. One of the six examples of a grave breach listed in article 85.3 is:

launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . <sup>93</sup>

"Excessive loss" is defined in terms of military necessity and means a loss which is "excessive in relation to the concrete and direct military advantage anticipated."<sup>94</sup> Article 85.5 recognizes grave breaches as war crimes; article 86 imposes criminal liability on superiors for the failure to prevent grave breaches under certain circumstances; and, article 87 imposes on commanders the duty to prevent, suppress and report breaches of the Protocol, and to initiate disciplinary action where appropriate.<sup>95</sup> Civil liability and the obligation to pay compensation is recognized in article 91 for violations of the Protocol by a party State and members of its armed forces.<sup>96</sup>

#### e. Conclusions

During the conduct of the Persian Gulf War, Iraq was bound by its treaty obligations of the 1949 Geneva Convention No. IV, and by the customary international law which the Convention codifies. Iraq is not a party to the 1977 Geneva Protocol I, and therefore not bound by its text. But, the provisions of the 1977 Geneva Protocol I which apply to environmental damage may be declaratory of customary law.

The 1949 Geneva Convention No. IV does not explicitly mention the environment; however, it adequately proscribes damage to the component parts of the environment when not absolutely rendered necessary by military

operations. This prohibition requires a balancing of any destruction with the absolute necessities of military operations. The 1977 Geneva Protocol I does, however, explicitly address environmental damage, and its analysis is also facilitated by applying it to the component parts of the environment in the context of the principle of military necessity.

The 1949 Geneva Convention No. IV is broad enough to encompass the use of methods or means based on any existing or new technology. Article 35(3) of the 1977 Geneva Protocol I is not limited to existing methods and means, and therefore is broad enough to encompass the use of methods or means based on any new technology. Article 36 of the 1977 Geneva Protocol I nonetheless requires parties to consider compliance with Protocol I and all other rules of international law when developing or adopting new methods or means.<sup>97</sup> The determination of whether or not a given act violates the 1949 Geneva Convention No. IV and the 1977 Geneva Protocol I requires the same balancing as that required for the 1907 Hague Convention No. IV, *i.e.*, the questioned act must be viewed in light of military necessity.

### 3. The 1977 ENMOD Convention

#### a. Historical Perspective

The U.S. Senate passed a resolution in 1973 stating that the United States "should seek the agreement of other governments to a proposed treaty prohibiting the use of any environmental or geophysical modification activity

as a weapon of war."<sup>98</sup> As a result of the negotiations that followed, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques was signed on May 18, 1977.<sup>99</sup> The 1977 ENMOD Convention is a short document consisting of a preamble, ten articles, and a set of four understandings in an annex, and its purpose is to prohibit the manipulation of the environment as a weapon.<sup>100</sup>

b. Applicability

The phrase "armed conflict" and the word "war" are not to be found in the 1977 ENMOD Convention. Instead, the convention uses a much broader term "military or any other hostile use" throughout. Article IV imposes on each party the obligation to take additional measures it considers necessary to prevent any violation of the provisions of the 1977 ENMOD Convention.<sup>101</sup> Taken together, it is clear that the binding effect of the 1977 ENMOD Convention is intended to govern conduct between nation States.

Iraq participated in the 1977 ENMOD Convention as a contracting State and signed it on August 15, 1977; however, it has not ratified the convention.<sup>102</sup> Having signed the treaty, with no subsequent declaration of intent not to become a party, Iraq is bound by article 18 of the Vienna Convention on the Law of Treaties "to refrain from acts which would defeat the object and purpose" of the 1977 ENMOD Convention.<sup>103</sup> While a given act may be a violation of the object and purpose of the 1977 ENMOD

Convention, that in and of itself does not impose any accountability under the convention on the responsible State or individual.<sup>104</sup> The 1977 ENMOD Convention is not declaratory of customary international law.<sup>105</sup>

### c. Environmental Proscriptions

Article I of the 1977 ENMOD Convention provides:

Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.<sup>106</sup>

Environmental modification techniques is a phrase used as a term of art that is defined in article II as:

any technique for changing -- through the deliberate manipulation of natural processes -- the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.<sup>107</sup>

It is important to emphasize that this provision does not prohibit damage to the environment *per se*. It prohibits a State from using the manipulation of the environment (which has widespread, long-lasting, or severe effects) as a method or means of warfare.<sup>108</sup> This is clearly supported by the language of the preamble and the text which discusses methods and not damage. For example, the preamble contains language as follows:

The States Parties to this Convention,  
Guided by the interests of . . . halting the arms race . . . complete disarmament . . . and of saving mankind from the danger of using new means of warfare. . .<sup>109</sup>

Article II is also the closest that the 1977 ENMOD Convention comes to defining the environment. This article defines the phrase "environmental modification techniques" as any technique for modifying "the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."<sup>110</sup> Thus, this convention encompasses animal and plant life, the earth's land mass, all the water on the earth's surface, and the atmosphere in the definition of environment.

One primary criticism of the 1977 ENMOD Convention is that the terms "widespread, long-lasting or severe" are too broad and vague.<sup>111</sup> These terms are defined in the first Understanding as follows:

- (a) "widespread": encompassing an area on the scale of several hundred square kilometers;
- (b) "long-lasting": lasting for a period of months, or approximately a season;
- (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.<sup>112</sup>

Although the definitions remain somewhat vague, this is a significant improvement over the approach of the 1977 Geneva Protocol I which prohibited "widespread, long-term and severe damage" but did not articulate any threshold for prohibited environmental destruction.<sup>113</sup> Furthermore, the environment is better protected by the 1977 ENMOD Convention because it only requires the existence of one of the three conditions, whereas the 1977

Geneva Protocol I requires the existence of all three.

The 1977 ENMOD Convention does not preempt the applicability of the customary principle of military necessity;<sup>114</sup> it sets an upper limit on environmental damage which cannot be overcome regardless of the demands of military necessity. This convention flatly prohibits "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."<sup>115</sup> To the extent that this flat prohibition is not exceeded, the 1977 ENMOD Convention recognizes the balancing of environmental damage with the customary principle of military necessity.

#### d. Sanctions

Article V of the 1977 ENMOD Convention sets up a procedure for consultation and co-operation between States with disputes, and allows a State to file a complaint with the U.N. Security Council, which may then investigate and issue a report.<sup>116</sup> If the report concludes that a State has been or is likely to be harmed, then the aggrieved State may request assistance from other parties.<sup>117</sup> These provisions have been criticized as being weak because of the possibility of a veto at the U.N. Security Council.<sup>118</sup> There are no provisions within the 1977 ENMOD Convention that refer to criminal or civil liability.

#### e. Conclusions



Although Iraq is bound to refrain from acts which would undermine the object and purpose of the 1977 ENMOD Convention, Iraq is not bound by its provisions. The Convention is not declaratory of customary international law, and was never ratified by Iraq. The terms of the Convention are broad enough to encompass any environmental modification technique yet to be developed. Its preamble specifically recognizes that "scientific and technical advances may open new possibilities with respect to modification of the environment."<sup>119</sup> However, the Convention does not prohibit damage to the environment. It only prohibits manipulation of the environment, and then, only if the manipulation results in widespread, long-lasting or severe effects. To determine whether or not a given act is a violation of this Convention requires a subjective analysis. If the act modifies the environment with widespread, long-lasting, or severe effects, and the resulting modification of the environment is used to gain a military advantage, then a violation of the 1977 ENMOD Convention has occurred. In contrast, if the act results in widespread, long-lasting, or severe but unforeseen environmental damage, then the environment itself is not being used as a weapon, and no violation of the 1977 ENMOD Convention has occurred.

#### 4. The Peacetime Regime

##### a. Applicability

The conventions whose primary function is to govern the ramifications of

environmental damage during peacetime play a critical role during armed conflict as well. This peacetime regime reinforces the legal foundation for civil liability for environmental damage established under the laws of war. Perhaps more importantly, when considering criminal responsibility, the peacetime regime also creates a context of international environmental law within which the principles of military necessity, unnecessary suffering, and proportionality can properly be evaluated. For example, if an act contemplated by a military commander was one which had never been the subject of international concern or convention, then it would be of less legal interest than if the act had been addressed by a pervasive set of international conventions. Environmental damage clearly falls in the latter category. The peacetime regimes are particularly important when the military commander making the decisions is also the head of state and familiar with international obligations.

Peacetime regimes continue to exist between countries during periods of armed conflict or war.<sup>120</sup> This is particularly true of multilateral agreements which establish rights and obligations *vis-a-vis* States beyond the parties to the conflict. Although a state of war may give rise to other corresponding defenses for breaches of a peacetime regime such as impossibility of performance<sup>121</sup> or military necessity,<sup>122</sup> these are issues of the factual consequences of war and are not relevant here. The issue is the continued

existence of a peacetime convention which protects the environment during an armed conflict between the parties.

There is no definitive answer under international law, either by tribunal or convention, to the question of the effect of war on treaties.<sup>123</sup> The traditional view is that war annuls treaties of every kind between the States at war; however, the modern view is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character."<sup>124</sup>

The modern view is consistent with the Vienna Convention on the Law of Treaties. Article 73 of the Vienna Convention states that "the present Convention shall not prejudice any question that may arise in regard to a treaty . . . from the outbreak of hostilities between States."<sup>125</sup> This article clearly does not resolve the issue, but makes the determination an individualized analysis of each treaty. Other articles of the Vienna Convention shed light on this analysis.

If the treaty does not provide for termination or suspension during hostilities, then the nature of the treaty must be compared to the relationship of the States during war. Article 56 of the Vienna Convention states that "[a] treaty which contains no provision regarding its termination . . . is not subject to denunciation or withdrawal unless . . . a right of denunciation or withdrawal may be implied by the nature of the treaty."<sup>126</sup> The operative language of this article is "the nature of the treaty." If the nature of a treaty,

for example, is to provide for military assistance and the sale of armaments, then it would be clear that such a treaty would be terminated, or at least suspended, during the period of hostilities. Furthermore, a state of war does break diplomatic relations and sever commercial transactions between enemy citizens.<sup>127</sup> In contrast, it would not be incompatible with the very nature of a treaty to allow a resident alien to inherit real property in the United States during a war with the resident alien's parent country.<sup>128</sup> Similarly, a regime which has as its object and purpose the protection of the environment is not incompatible with the state of war. Two nations can be at war, and still follow the norms of a regime which protect the environment. Indeed, the laws of armed conflict protect the environment by a balancing test which invokes the principles of military necessity, unnecessary suffering, and proportionality. Therefore, peacetime regimes which protect the environment should not be considered *per se* inconsistent with a state of war.

If hostilities are considered as a fundamental change of circumstances, then article 62 of the Vienna Convention also offers guidance in determining the status of a treaty during armed conflict. This article sets forth, in the conjunctive, the following two requirements before the doctrine of fundamental change of circumstances can be invoked:

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for

terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.<sup>129</sup>

The changed circumstances in the inquiry of the effect of war on a convention is that a state of peace no longer exists between the parties. In the context of the first requirement of article 62, the existence of peace must have constituted an essential basis of consent. This analysis is intertwined with determining the nature of the agreement in article 56. An armed conflict would clearly vitiate conventions which concern diplomatic and consular relations, the sale of armament, military assistance programs, and collective defense. The existence of peace is indispensable for the application of these types of conventions. On the other hand, it is perplexing to try to visualize how a state of war would affect future obligations, and thus the basis for consent, under conventions which concern the protection of an endangered species or the protection of the ozone layer. These latter two examples are an extreme to make a point. Logically, it follows that all conventions which protect the environment are not inconsistent, as a whole, with the state of war.

The second requirement which must be met before article 62 would permit armed conflict to be invoked as a fundamental change of circumstances is also difficult to satisfy when the convention concerns the

protection of the environment. Armed conflict does not radically transform a State's obligations still to be performed under a treaty designed to protect an endangered species or the ozone layer. Indeed, armed conflict does not transform a State's obligations at all to protect the environment.

A strong argument can thus be made that armed conflict does not terminate a State's obligations under a bilateral convention that has the protection of the environment as its object and purpose. However, in a setting where only a portion of the parties to a multilateral agreement are at war, a compelling argument emerges. A multilateral treaty obligation of State A *vis-a-vis* other party States is not changed merely because State A is at war with party State B. There is nothing about a state of war between two parties that affects their respective relationship with neutral States for these purposes. In addition to the contractual obligation imposed by the convention, belligerent States also have a duty under the laws of war to respect the rights of neutral States.<sup>130</sup> The following is a discussion of the primary peacetime convention which is applicable to the type of environmental damage which occurred during the Persian Gulf War.

b. The 1982 LOS Convention

The United Nations Convention on the Law of the Sea<sup>131</sup> does not exclusively address environmental concerns. The purpose of the 1982 LOS Convention was to establish a comprehensive regime "dealing with all matters

relating to the law of the sea, . . . bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole."<sup>132</sup> The 1982 LOS Convention is the end result of fourteen years of work by over 150 different States;<sup>133</sup> however, the Convention has not yet entered into force.<sup>134</sup>

Iraq did participate as a negotiating and contracting State, ratifying the 1982 LOS Convention on July 30, 1985.<sup>135</sup> Having deposited its instrument of ratification, with no subsequent notice of withdrawal or denunciation, Iraq is bound by article 18 of the Vienna Convention on the Law of Treaties "to refrain from acts which would defeat the object and purpose" of the 1982 LOS Convention.<sup>136</sup> Furthermore, the 1982 LOS Convention, with the exception of the provisions concerning deep sea-bed mining and particular arrangements for settling disputes, is considered by most States as declaratory of customary international law.<sup>137</sup> Although some provisions of the 1982 LOS Convention permit a temporary suspension of the rights of other States if essential for national security,<sup>138</sup> there are no provisions of the 1982 LOS Convention which discuss the effect of armed conflict on the Convention.

All of part XII of the 1982 LOS Convention concerns the "Protection and Preservation of the Marine Environment."<sup>139</sup> Article 192 imposes a general duty to protect and preserve the marine environment.<sup>140</sup> Article 194 is a lengthy provision that imposes an imprecise and subjective obligation to take all necessary measures to "prevent, reduce and control pollution of the

marine environment from any source."<sup>141</sup> The more specific provisions that apply to the environmental damage in the Persian Gulf are found in article 207 for pollution from land-based sources,<sup>142</sup> article 210 for pollution by dumping,<sup>143</sup> article 211 for pollution from vessels,<sup>144</sup> and article 212 for pollution from or through the atmosphere.<sup>145</sup>

There are three articles in the 1982 LOS Convention which specifically provide for State accountability for damage. Articles 31 and 42(5) impose international responsibility for any damage to a State caused by a government ship or aircraft under its control in a non-commercial setting.<sup>146</sup> A much more comprehensive expression of liability is found in article 235. This article provides, in pertinent part, as follows:

1. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law. . . .

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate . . .<sup>147</sup>

These provisions of the 1982 LOS Convention are unequivocal. They make it clear that under a peacetime scenario a State has an international obligation to protect and preserve the marine environment, and has international responsibility for any damage it causes. Although some provisions of the 1982 LOS Convention may be inconsistent with a state of hostilities,<sup>148</sup> a continuing duty under a multilateral convention and customary



international law to protect the environment is not.

c. Conclusion

The peacetime obligations of a convention that are not inconsistent with a state of hostilities should be enforced by the international community. The 1982 LOS Convention is the principal peacetime convention which protects the environment. There are others. The Convention on the High Seas<sup>149</sup> has similar prohibitions to prevent marine pollution by oil; however, its provisions providing sanctions are weak.<sup>150</sup> The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters<sup>151</sup> and the Convention for the Prevention of Pollution of the Sea by Oil<sup>152</sup> are two other relevant conventions that are a part of international environmental law. Iraq is a party to the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, and a member of the Regional Organization for the Protection of the Marine Environment which oversees oil spills in the Persian Gulf.<sup>153</sup> All of these conventions impose an obligation to prevent marine pollution.

These peacetime conventions form a very important subset of the legal norms which proscribe environmental damage during armed conflict. Although they may not directly govern the conduct of hostilities, they do reinforce civil liability and help define criminal responsibility under the laws of war. These peacetime regimes may also provide for organizations

responsible for effective clean-ups. Additionally, where international convention fails to address a specific issue or is not binding on a State, and customary international law does not address the point, then these peacetime regimes can "fill the gap" as general principles of law recognized by civilized nations.<sup>154</sup>

### B. International Custom

Customary international law of armed conflict has existed for thousands of years.<sup>155</sup> When conventions first began codifying custom in the 1850s,<sup>156</sup> it was clearly articulated in the conventions that much of the law continued to exist as custom.<sup>157</sup> These provisions pervade modern international conventions and make it unequivocal that there are fundamental principles of customary international law that are binding on all States.<sup>158</sup> An international convention which codifies existing international law merely provides another basis for binding its parties.<sup>159</sup>

A discussion of these longstanding customary principles follows below; however, there is also a developing principle of customary international law that "nature is no longer fair game in mankind's conflicts."<sup>160</sup> This emerging principle is embodied in a 1982 U.N. General Assembly Resolution, the "World Charter for Nature," that provides "nature is to be secured against degradation caused by warfare" and "military activities damaging to nature are to be avoided."<sup>161</sup>

## 1. Limited Means

The very heart of all the laws of war is "that the right of belligerents to adopt means of injuring the enemy is not unlimited."<sup>162</sup> This principle is the very fabric of the laws of armed conflict and is explicitly incorporated in all of the laws of armed conflict because they, by their very nature, limit the conduct of hostilities.<sup>163</sup> The principles of proportionality and discrimination are corollaries of this cardinal principle of limited means.<sup>164</sup>

## 2. Proportionality and Discrimination

Two other key principles of customary law are proportionality and discrimination.<sup>165</sup> Proportionality is a very fact-specific concept that limits the use of force.<sup>166</sup> Discrimination restricts methods, weapons, and targets.<sup>167</sup> To make these two principles functional, they have been refined in military usage to the following three, interrelated customary principles of law.<sup>168</sup>

### a. Military Necessity

The principle of military necessity states "only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied." (emphasis added)<sup>169</sup> The proportionality aspect of military necessity does not require a State to limit its means and methods of warfare to a level equivalent to its enemy's weapons systems and force levels.<sup>170</sup> However, it does not permit, as the

Germans contended during WWII, "the right to do anything that contributes to the winning of a war."<sup>171</sup> The emphasized language of the definition makes it unequivocal that there are constraints on this principle. Military necessity permits:

the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law.<sup>172</sup>

This principle requires that the destructive act be connected to the submission of the enemy.<sup>173</sup>

The laws of armed conflict are not subject to or restricted by the principle of military necessity; it is the principle of military necessity that is subject to and restricted by the laws of armed conflict.<sup>174</sup> One such restriction in customary international law is that only combatants and military objectives may be attacked.<sup>175</sup> Under customary international law, military objectives are those "objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack."<sup>176</sup>

b. Humanity

The principle of humanity, also known as the principle of unnecessary suffering and destruction, states that "[t]he employment of any kind or degree of force *not* required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited."<sup>177</sup> Humanity prohibits, for example, the use of projectiles that cause superfluous injury or are undetectable by field x-ray equipment, and indiscriminate weapons such as the WWII German V-2 rockets that cannot be directed against a military objective.<sup>178</sup>

The customary principles of military necessity and humanity are complementary in nature.<sup>179</sup> Whereas military necessity only permits the use of force toward a military objective, humanity prohibits force which "needlessly or unnecessarily causes or aggravates both human suffering and physical destruction."<sup>180</sup>

### c. Chivalry

The principle of chivalry states that "[d]ishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden."<sup>181</sup> Chivalrous conduct is a broad concept that has lost its effectiveness as an independent principle of law which governs the conduct of war;<sup>182</sup> however, it is still valid and implemented through specific provisions of the law of armed conflict that concern perfidy and ruses of war.<sup>183</sup> Chivalry permits acts, such as espionage, that are misleading but are ones the enemy

should protect himself against.<sup>184</sup> In contrast, chivalry prohibits perfidy, which is a deception "designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence."<sup>185</sup>

### C. Key definitions

#### 1. Environment and Environmental Damage

The environment is an intangible concept that is difficult to define. The 1977 ENMOD Convention implicitly defines the environment by its component parts.<sup>186</sup> If the environment is considered in its component parts, *i.e.*, animal and plant life, real estate, beaches, oceans, *etc.*, as property, then determining whether environmental damage exists is simple. Oil polluted beaches and dead wildlife are easy to identify. The environment is best defined in a very broad sense as anything that exists which is not man-made. Therefore, in its most simplistic terms, environmental damage is any adverse, incremental change in the existing status of the environment.

The more difficult and contentious issue is what level of environmental damage should be proscribed during armed conflict. Any attempt to proscribe environmental damage in terms of a fixed level of damage that cannot be exceeded would be impractical and would fail. The 1977 ENMOD Convention attempted to fix a level of damage that could not be exceeded, and it has been criticized for being too broad and vague.<sup>187</sup> As previously

discussed, the laws of war require an analysis of the principles of military necessity, unnecessary suffering, and proportionality. To create an absolute standard could impair a State's inherent right of self-defense.<sup>188</sup> The military commander must be given the discretion to weigh the military necessity of an act with its corresponding environmental damage.

There is no need to further define "environment" or "environmental damage." The only reason to try is to attempt to place an absolute limit on environmental damage that cannot be exceeded by a military commander. The military commander should consider environmental damage as an important factor in balancing the laws of war. If a proper system of deterrence is in place, then the military commander will be held accountable for his failure to adequately consider the environmental consequences of his military operations.

## 2. Armed Conflict and the Threshold of Application of the Laws of War

A formal state of war is not required to invoke the norms of *jus in bello*.<sup>189</sup> They apply in all situations of international armed conflict and military occupation.<sup>190</sup> What then is war? And, what is a formal state of war? Is war somehow different than armed conflict or hostilities? In 1862 the United States Supreme Court defined war under the law of nations as "[t]hat state in which a nation prosecutes its right by force."<sup>191</sup> The conventions

discussed so far have used the phrases "war," "armed conflict," "hostilities," and "military or other hostile use" as a period of time during which they proscribe conduct, but these conventions do not offer any definitions.

It appears from recent usage, to include this study, that all of these terms can be used interchangeably in referring to the period during which the laws of armed conflict apply.<sup>192</sup> It also appears that one consequence of this shift in usage is to lower the threshold for when the laws of armed conflict apply.<sup>193</sup> This is a desirable result because it will protect the environment to the greatest extent possible by making it more likely that the laws of armed conflict will apply notwithstanding a State's creative renaming of a war as an incident, intervention, police action, etc.<sup>194</sup> One consequence of lowering the threshold is to cloud the issue of the applicability of the peacetime regime; however, as can be seen from the discussion above, the laws of armed conflict are better suited to protect the environment when issues of military force are being analyzed. The peacetime regime, although applicable in most armed conflict scenarios, does not account for environmental damage which results from legitimate self-defense. If good faith is exercised in applying the existing principles of the laws of armed conflict, then the environment will be protected. If good faith is not exercised, then the military commander should be held accountable.

The conclusion thus far is that the threshold of applicability should be



low. The difficult issue remaining is at what threshold of coercive conduct between two States should the laws of armed conflict become applicable. Two resolutions of the Institute of International Law set the threshold very low in the case of forces under the control of the United Nations.<sup>195</sup> The laws of armed conflict have traditionally governed the conduct between nations, not organizations.<sup>196</sup> Consequently, there was a movement to ensure that the laws of armed conflict applied to forces of the United Nations.<sup>197</sup> Part of this movement was the enactment of these resolutions,<sup>198</sup> which key the application of the laws of armed conflict to a state of hostilities.<sup>199</sup>

This definitional approach results in a circuitous argument, however, unless a factual analysis is used to determine a state of hostilities. Factually, we can define the outer limits on a linear model of a state of hostilities by examining obvious examples. Since full diplomatic and consular relations would be a peaceful state, hostilities do not begin until after a deterioration in these relations. On the other hand, a declaration of war<sup>200</sup> or the use of military force clearly constitutes hostile relations. What remains between these two examples is a gray area. Precisely when peace ends and hostilities begin within this gray area will be a very fact-intensive determination. If there is any question whether the laws of armed conflict apply, a prudent State should presume they apply. In all cases a military commander and his advisors should assume that they apply.

#### IV. CRIMINAL RESPONSIBILITY FOR WAR CRIMES

*Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.*<sup>201</sup>

*U.N. International Law Commission*

##### A. Criminal Responsibility: Modern Beginnings

It is undisputed that individual criminal responsibility for violations of the laws of war is a part of customary international law.<sup>202</sup> Criminal responsibility can extend to individual combatants, government officials, and Heads of State.<sup>203</sup> Furthermore, it is a recognized principle of international law that "[l]eaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [crimes against peace, war crimes, and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan."<sup>204</sup> A defendant convicted of a war crime may be sentenced to any punishment, including the death penalty.<sup>205</sup>

The trials following World War I were the first major international effort to punish war crimes.<sup>206</sup> These trials are referred to as the Leipzig trials, and were generally unsuccessful.<sup>207</sup> Consequently, the Allies took a different approach during World War II.

In 1942, the Allies signed, in London, a declaration that the punishment of war crimes was a principal goal of the Allies.<sup>208</sup> To specifically avoid a

repeat of the Leipzig trials, the Allies signed the Moscow Declaration of October 30, 1943, that stated suspected war criminals would be tried "by the people and at the spot where the crime was committed."<sup>209</sup> The Moscow Declaration also stated that crimes with no specific geographic setting would be the subject of a later joint decision.<sup>210</sup> On August 8, 1945, an agreement<sup>211</sup> was signed by the Allies establishing an International Military Tribunal to try Germans whose alleged crimes had no situs.<sup>212</sup> Annexed to the 1945 London Agreement was the Charter of the International Military Tribunal.<sup>213</sup>

The International Military Tribunal at Nuremberg conducted one trial of twenty-four German defendants.<sup>214</sup> Additionally, Allied agreements provided for the prosecution of defendants beyond the jurisdiction of the International Military Tribunal.<sup>215</sup> Pursuant to these provisions, the United States tried twelve cases with multiple defendants by military tribunals.<sup>216</sup> However, the overwhelming majority of the war crime prosecutions after World War II were tried by national courts or military occupation courts.<sup>217</sup> United States military commissions tried 489 cases involving 1672 accused at Dachau, Germany, alone.<sup>218</sup>

The International Military Tribunal for the Far East based its jurisdiction initially on the Potsdam Declaration of July 26, 1945, issued by the United States, United Kingdom, and China.<sup>219</sup> On April 3, 1946, the Allied Far Eastern Advisory Committee issued a policy decision upon which twenty-

five defendants were tried and convicted.<sup>220</sup> Although States have prosecuted their own nationals for violations of the law of armed conflict, war crimes trials of enemy personnel have generally been avoided by States since World War II.<sup>221</sup>

#### B. The Legal Framework: An ad hoc Approach

All nations have an obligation to enact legislation to punish grave breaches of international law, to search for persons accused of grave breaches, and to bring them to trial before its own courts.<sup>222</sup> However, the most sensible option available to the world community to try war criminals is an international tribunal created under the cognizance of the United Nations. This would serve to strengthen the role of the United Nations in the rule of law, and is consistent with the purposes of the United Nations.<sup>223</sup>

Articles 29, 39 and 41 of the U.N. CHARTER collectively authorize the Security Council to establish an ad hoc international tribunal to try violations of the laws of armed conflict.<sup>224</sup> All member States of the United Nations must recognize any judgment of this ad hoc tribunal pursuant to the requirements of articles 25, 48 and 49 of the U.N. CHARTER.<sup>225</sup> In creating an International Military Tribunal for the Persian Gulf, the Security Council could rely upon the Charter of the International Military Tribunal created by the 1945 London Agreement<sup>226</sup> that organized the trials at Nuremberg. The 1945 Charter of the IMT establishes the constitution, jurisdiction, general

principles, powers and procedures of the tribunal; created a committee for the investigation and prosecution of war criminals; and outlined the requirements ensuring a fair trial for the defendants.<sup>227</sup>

The Security Council also has the option of utilizing a regional arrangement or group to conduct Persian Gulf war crimes trials.<sup>228</sup> A logical choice would be a tribunal composed of the coalition forces. In delegating this authority, the Security Council could offer as much or as little mandate or guidance as it desired. This option would still be under the cognizance of the United Nations, and would continue to enforce the role of the United Nations in world peace.<sup>229</sup>

#### C. Trial in absentia

Article 12 of the 1945 Charter of the IMT granted the Nuremberg tribunal jurisdiction over defendants in absentia.<sup>230</sup> One defendant at the Nuremberg trials was tried in absentia and sentenced to death by hanging.<sup>231</sup> In 1946, the General Assembly of the United Nations unanimously affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."<sup>232</sup>

It is strongly preferred to have *in personam* jurisdiction over a defendant.<sup>233</sup> However, a trial in absentia conducted in a fair manner also supports deterrence and the rule of law by demonstrating the world community's commitment to condemn violations of the laws of armed

conflict. A defendant who has been convicted, or at least indicted, could not travel outside a State refusing extradition without fear of arrest.<sup>234</sup> An indictment would also make a defendant subject to custody by coercive action or abduction.<sup>235</sup>

## V. STATE RESPONSIBILITY AND REPARATION

*[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*<sup>236</sup>

### *Permanent Court of International Justice*

State responsibility and reparation are complementary doctrines that are universally accepted in international law.<sup>237</sup> Reparation is the liability under customary international law to pay compensation for a violation of any of the laws of armed conflict.<sup>238</sup> Compensation can be made in the form of a formal apology, restitution in kind, a monetary payment, or some combination thereof.<sup>239</sup> The monetary payment, depending on the circumstances, may be for the value of the property at the time of the taking plus interest to the date of payment, medical expenses, loss of earnings, pain and suffering, and mental anguish.<sup>240</sup>

It is imperative to hold States responsible to deter future violations of the laws of war.<sup>241</sup> During the conduct of hostilities, the methods for obtaining reparations are limited. Practically the only effective method during hostilities is seizing assets of the offending State for distribution by a claims

tribunal. After the hostilities are over, reparations can be made by a program determined by the agreement ending the hostilities, or by an international tribunal set up under the authority of the Security Council of the United Nations. The latter could be done pursuant to the authority given the Security Council in articles 39 and 41 of the U.N. CHARTER.

In addition to seeking reparations, a wronged State has many other methods to encourage compliance with the laws of armed conflict. It could "[p]ublicize the facts with a view toward influencing world public opinion against the offending nation," and it could "[s]eek the intervention of a neutral party."<sup>242</sup> Under appropriate circumstances, the International Court of Justice and national courts could be used to settle a dispute concerning reparations. Unilateral or collective embargoes and trade sanctions can be used as well to encourage compliance with the laws of armed conflict.

Although ensuring compensation to those victimized is very important, the corresponding effect of reparations on the offending State should also be considered.<sup>243</sup> Excessive reparations can cripple the compensation scheme, impoverish the people of the offending State, and destroy the economic viability of the offending State.<sup>244</sup>

#### VI. THE ADEQUACY OF THE PROHIBITIONS CONTAINED IN THE EXISTING LEGAL ORDER: A CASE ANALYSIS OF THE ENVIRONMENTAL DESTRUCTION IN KUWAIT

*To witness the fire and smoke of the burning oil fields was to glimpse*

*the apocalypse.*<sup>245</sup>

*John Norton Moore, Professor of Law  
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#### A. The Environmental Destruction in Kuwait

The Iraqi invasion of Kuwait on August 2, 1990, resulted in "the most momentous and destructive war in modern history . . . [and] unprecedented environmental ruin."<sup>246</sup> This environmental damage was caused primarily by the torching of oil wells, the flooding of oil into the Persian Gulf, and incidental damage caused by military bombing and maneuvers.

During its retreat, the Iraqi army intentionally dynamited 732 producing oil wells in Kuwait.<sup>247</sup> Six hundred and fifty of these oil wells caught fire,<sup>248</sup> causing oil laden clouds as high as 22,000 feet.<sup>249</sup> Some of the blazes reached two hundred feet in the air, while the eighty-two dynamited wellheads that did not catch fire continuously poured oil into the countryside.<sup>250</sup> At the peak of destruction, the fires burned about five million barrels of oil daily, generated more than half a million tons of aerial pollutants per day,<sup>251</sup> and consumed one hundred million dollars of oil daily.<sup>252</sup>

These fires have created enormous smoke-related health problems: marked increases in bronchial and asthma cases, and upper-throat infections; researchers are very concerned about the carcinogens in the atmosphere; reduced sunshine may cause deficiencies in vitamins D and E; and, air



pollutants will enter the milk of sheep and dairy cattle.<sup>253</sup> One expert estimates that the air pollution levels in Kuwait could cause 1,000 excess deaths annually and increase the prewar mortality rate by as much as twenty percent.<sup>254</sup> The U.S. Environmental Protection Agency reported that the oil well fires in Kuwait "may represent one of the most extraordinary manmade environmental disasters in recorded history."<sup>255</sup> The N.Y. TIMES reported that these fires are believed to be one of the world's "gravest air pollution disasters," and just two days after the fires began Iran reported that "black rain" had fallen on its lands.<sup>256</sup> One observer reported:

The overpowering stench of burning oil turns the stomach. Greasy black soot soon coats eyeglasses, collects on surgical masks used to protect the lungs, clings to the skin and soils clothing.<sup>257</sup>

The last oil well fire was not extinguished until November, 1991, eight months after the Iraqi retreat.<sup>258</sup>

The intentional flooding of the oil into the Persian Gulf was equally disastrous. Oil spills estimated at four to six million barrels covered some six hundred square miles of the sea surface of the Persian Gulf and three hundred miles of coastline.<sup>259</sup> The enormous oil slick created by this flooding has irreparably damaged a unique ecosystem full of marine life.<sup>260</sup> The destruction of this food source will be felt for generations, and the seeping oil could taint the groundwater supply.<sup>261</sup> Thousands of migratory birds have perished mistaking the oil lakes for water.<sup>262</sup> The toxic metals released by the

oil slicks and torched wells that will enter the food chain can cause brain damage and cardiovascular disorders in humans.<sup>263</sup>

Incidental damage to the environment was caused by the bombing of chemical factories and weapon stockpiles.<sup>264</sup> The United Nations Environmental Programme (UNEP) Director reported that heavy off-road vehicles destroyed vegetation and disrupted the soil surface.<sup>265</sup>

#### B. Environmental Restoration - A Global Effort

Twenty-eight teams from ten countries<sup>266</sup> joined in "history's biggest fire fight."<sup>267</sup> These teams exceeded ten thousand workers<sup>268</sup> from the United States, Canada, Britain, China, Iran, France,<sup>269</sup> Hungary,<sup>270</sup> the Soviet Union, Romania, and Kuwait.<sup>271</sup>

The last oil well fire was ceremoniously sealed on November 6, 1991.<sup>272</sup> The total cost for the operation to put out the fires was estimated to be almost two billion dollars.<sup>273</sup> The next step in the clean-up was to begin to drain the twenty-five to fifty million barrels of oil in the hundreds of lakes that dot the Kuwaiti countryside.<sup>274</sup> Total reconstruction and rehabilitation is estimated to cost twenty-two billion dollars.<sup>275</sup> In contrast to its prewar oil production of two million barrels daily, Kuwait was only able to produce 300,000 barrels daily in November, 1991.<sup>276</sup> Full production will not return until 1993 at the earliest.<sup>277</sup>

#### C. Delineating the Environmental Crimes

## 1. Military Necessity

The principle of military necessity is the controlling factor in all of the applicable conventions that proscribe the environmental damage which occurred during the Persian Gulf War. The customary law embodied in the 1907 Hague Convention No. IV provides that it is forbidden to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."<sup>278</sup> As evidence of customary law, this restriction is binding on Iraq.<sup>279</sup>

Iraq is a party State to the 1949 Geneva Convention No. IV, which prohibits destruction during occupation that is not "rendered absolutely necessary by military operations."<sup>280</sup> The 1977 Geneva Protocol I, which prohibits attacks which cause excessive damage "in relation to the concrete and direct military advantage anticipated," is strong evidence of customary law, and, as such, would be binding on Iraq.<sup>281</sup>

Iraq has not ratified the 1977 ENMOD Convention, and the convention is not declaratory of customary law; however, as a contracting State, Iraq is obligated to refrain from acts which would defeat the object and purpose of the convention.<sup>282</sup> Although this convention does not permit "widespread, long-lasting or severe" environmental damage, it recognizes the principle of military necessity.<sup>283</sup>

The following sections will analyze the environmental damage caused by

Iraq in the Persian Gulf to determine whether or not that damage was justified by military necessity, and to determine what crimes, if any, occurred.<sup>284</sup> Saddam Hussein began threatening on August 2, 1990, that he would turn Kuwait into a graveyard if anyone came to Kuwait's aid.<sup>285</sup> These previous threats to destroy Kuwait undermine any argument that the environmental damage was justified by military necessity.

## 2. The Flooding of Oil into the Persian Gulf

On January 25, 1991, Iraq dumped several million barrels of oil from the Sea Island crude oil tanker loading terminal, drained five oil tankers in the port of Mina al Ahmadi, and pumped oil from storage tanks ashore into the Persian Gulf.<sup>286</sup> Based upon an assessment of the circumstances at the time, the U.S. Department of State characterized the deliberate spill as "indiscriminate environmental war."<sup>287</sup>

The military advantage to Iraq in dumping the oil into the Persian Gulf was estimated to be minimal.<sup>288</sup> A small portion of the flooding of oil appears to have been incidental to legitimate military operations. During the battle for Al Khafji, for example, Iraqi artillery ruptured oil tanks which released oil into the Persian Gulf.<sup>289</sup> It is not known whether these tanks were intentionally targeted or inadvertently damaged; however, the great bulk of the oil spill was an intentional release at the Sea Island terminal and the anchored tankers unrelated to any immediate military objective.<sup>290</sup>

Three theories may explain Iraq's motivation for dumping the oil: "creation of a defensive barrier against amphibious assault, environmental terrorism to dispirit public opinion, and a tactical probe seeking to test allied forces and possibly disrupt them."<sup>291</sup> Of these three theories, only the first and last might be justified by military necessity. However, Iraq's initial threats to destroy Kuwait and its past use of oil spills as terrorism in the Iran-Iraq War highlight that the motivation was improper and illegal environmental terrorism.<sup>292</sup>

### 3. The Torching of the Oil Wells

The extensive planning to destroy all of Kuwait's producing wells began immediately after the invasion.<sup>293</sup> Petroleum engineers packed almost every wellhead with thirty to forty pounds of Russian-made plastic explosive, and wired those wellheads with an electric detonation system backed-up by mechanical detonators.<sup>294</sup> On February 22, 1991, Iraq "systematically and deliberately destroyed" approximately one hundred oil wells, tanks, export terminals and other installations in Kuwait in its "scorched-earth policy" to destroy the entire oil production of Kuwait.<sup>295</sup> Iraq continued on February 23 to destroy another one hundred oil wells, and more oil facilities and shipping terminals.<sup>296</sup> A total of 732 producing oil wells in Kuwait were set on fire or damaged.<sup>297</sup>

The military advantage to Iraq in torching the wells was estimated to be

minimal.<sup>298</sup> The vindictiveness was emphasized by the fact that Iraq also damaged or destroyed all twenty-six gathering centers which separate the oil, gas and water from one another, and are necessary for oil production.<sup>299</sup> Iraq also destroyed all the technical specifications for each well.<sup>300</sup> Neither of these latter acts have any justification under the principle of military necessity. The Science Adviser to King Hussein of Jordan stated that "[s]trategically it was senseless . . . The only casualty was the environment."<sup>301</sup> The *New York Times* has referred to the torching of the wells as "an act of insane vindictiveness."<sup>302</sup>

During hearings of the U.S. Senate Gulf Pollution Task Force on October 16, 1991, legal scholars agreed that "Iraq's actions were militarily disproportionate, wantonly destructive of civilian assets, and had unnecessarily destroyed property."<sup>303</sup> An international conference in Canada "On the Use of the Environment as a Tool of Conventional Warfare" during July, 1991, also concluded that the environmental damage was not supported by military necessity.<sup>304</sup> The Deputy Legal Adviser of the Department of State stated that the principle of military necessity "was repeatedly and wantonly violated by Iraq in the Gulf War."<sup>305</sup> The U.S. Senate Gulf Pollution Task Force makes an excellent summary in the following statement:

Yet the vastness of the destruction and the disproportionate impact of Iraq's acts on the civilian population of its enemies would appear to contradict any claim that all the well fires and oil spills were impelled by

immediate and proper military considerations. The combined adverse effects of the oil spills and well fires on the civilian population, through environmental contamination and destruction of resources, were immediate and obvious, while any military advantage would appear to have been remote and speculative.<sup>306</sup>

To the extent that the Iraqi actions in the flooding of oil into the Persian Gulf, the torching of the oil wells, and the incidental combat damage was not justified by military necessity, violations of the 1949 Geneva Convention No. IV and the customary laws of armed conflict occurred.

#### 4. Drafting the Charges

A draft indictment has been prepared by the Commission for International Due Process of Law and submitted to the Secretary-General of the United Nations.<sup>307</sup> With respect to environmental damage, the following two charges were drafted:

##### CHARGE I:

That the Defendants, Saddam Hussein and his military, political and economic advisors and other unnamed Defendants, did commit violations, *see* Amnesty International, *Iraq/Occupied Kuwait -- Human Rights Violations Since August 2, 1990*, MDE 14/16/90, December 1990, of the laws of war contained in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, T.I.A.S. 3365, to which Iraq acceded on February 14, 1956, and of customary laws of war, by carrying out the invasion and subsequent occupation of Kuwait, to wit: . . .

Specification 10: In that, the Defendants, in violation of Article 53 of this Convention, destroyed the real and personal property of protected persons and the State of Kuwait; this destruction was not absolutely necessary to military operations and occurred for the most part after military operations had ceased . . .

CHARGE V:

That in violation of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614, which Iraq signed on August 15, 1977, the Defendants deliberately released millions of gallons of crude oil into the Persian Gulf for the express purpose of gaining military advantage while creating effects extremely harmful to human welfare.<sup>308</sup>

Although this indictment is an excellent draft, a few corrections should be made with respect to charging environmental crimes. First, while charge I initially refers to the 1949 Geneva Convention No. IV and customary laws of war, specification 10 only charges a violation of article 53 of the 1949 Geneva Convention No. IV. This specification should be modified to allege a violation of the convention and the customary laws of war. Even though the 1949 Geneva Convention No. IV embodies customary law, this modification would make it certain that violations of both were being alleged. This is important because customary laws of war are broader in scope than that subset of customary law codified in article 53 of the 1949 Geneva Convention No. IV.

Second, the violations described in specification 10 refer only to the destruction of real and personal property. While this allegation is broad enough to encompass the torching of the oil wells, the flooding of oil into the Persian Gulf, and incidental combat damage not justified by military



necessity, the factual basis for the pleadings found in the Amnesty International document incorporated in Charge I appear to only include human rights violations. Whatever reference used to plead the facts must include all of those facts that give rise to the environmental damage.

Third, while charge V is well drafted, it fails to state an offense with respect to Iraq. Iraq participated in the 1977 ENMOD Convention as a contracting State and signed it on August 15, 1977 as alleged; however, it has not ratified the convention.<sup>309</sup> Iraqi defendants cannot be held accountable for environmental damage strictly as a violation of this convention.<sup>310</sup> Furthermore, prosecution under this convention is even more tenuous because it does not provide, within its text, for criminal liability.<sup>311</sup>

#### D. Seeking Individual Criminal Responsibility

What has been the world community's response to the environmental damage during the Persian Gulf War? There has been widespread condemnation of Iraq's aggression and violations of the laws of armed conflict. There has also been considerable agreement that the torching of the oil wells and the dumping of the oil into the Persian Gulf violated the laws of armed conflict. However, no tribunal has been established to try Iraqi war criminals.<sup>312</sup>

Prior to the coalition defensive response on January 17, 1991, there were twelve United Nations Security Council Resolutions that resulted from the

Iraqi invasion of Kuwait.<sup>313</sup> Of these twelve, two Security Council Resolutions reaffirmed criminal responsibility established under the existing conventions and customary law previously discussed by stating:

that the Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches . . .<sup>314</sup>

Security Council Resolution 674 also attempts to facilitate later trials by encouraging States to collect evidence of grave breaches as follows:

*Invites* States to collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and to make this information available to the Security Council; . . .<sup>315</sup>

Yet, one year after the end of the Persian Gulf War the Security Council has not established a war crimes tribunal.<sup>316</sup>

After the coalition defensive response on January 17, 1991, the Security Council received letters from the Foreign Minister of Iraq agreeing to comply with all twelve of the earlier Security Council Resolutions.<sup>317</sup> This resulted in the thirteenth resolution concerning the Persian Gulf crisis, Security Council Resolution 686, adopted on March 2, 1991, which declared a formal cease fire and demanded that Iraq:

Accept in principle its liability under international law for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.<sup>318</sup>

In addition to the United Nations Resolutions, there has been almost a universal call for war crimes trials.<sup>319</sup> In September, 1990, just six weeks after the invasion of Kuwait, international law scholars were calling for war crimes trials.<sup>320</sup> In April, 1991, the Foreign Ministers of the European Community nations and the United States Senate declared their support for the establishment of a war crimes tribunal under the cognizance of the United Nations.<sup>321</sup> On February 25, 1991, Saudi Arabia announced that there would be an international criminal tribunal and trials of captured Iraqis accused of war crimes.<sup>322</sup> The United States Senate, the United States House, and the House of Delegates of the American Bar Association all strongly advocate war crimes trials.<sup>323</sup>

The United States Department of Defense has collected evidence for war crimes trials and submitted evidence of grave breaches to the Security Council as required by Security Council Resolution 674.<sup>324</sup> The Department of State is, however, opposed to trials in absentia and the convening of international tribunals prior to the custody of any defendants.<sup>325</sup> The rationale for this position is the Department of State's belief that the "rule of law is best advanced through proceedings where the defendant is present and represented by counsel."<sup>326</sup>

To strengthen the deterrent value of the existing laws, it is very important to proceed with war crimes trials as soon as possible. If custody of the

defendants cannot be obtained, then at the very minimum a tribunal should be convened and an indictment issued by name for all of the defendants. A defendant that has been indicted could not travel or move about freely without fear of arrest.<sup>327</sup> If in absentia, a trial could proceed through the prosecution, holding the defense presentation in abeyance until custody is obtained. This would at least preserve the evidence of the crimes. Another option would be for the tribunal to appoint a defense team to ensure the appearance of a fair trial even in the absence of the defendants.

There are many reasons why war crimes trials should be initiated. First, all nations have an obligation to search for persons accused of grave breaches and to bring them to trial.<sup>328</sup> Second, if the international community fails to continue the precedent of war crimes trials, then the practice of States, *i.e.*, customary international law, may erode the authority to prosecute offenders.<sup>329</sup> Third, Security Council Resolutions and the pronouncements of world leaders will be of no deterrent value in the future if the flagrant violations of Iraq go unpunished.<sup>330</sup>

There are, however, arguments that war crimes trials should not proceed now that a cease fire has been called. Most of these arguments are derived from some political supposition and are not based in the law. One principal argument against war crimes trials is that they would encourage Saddam Hussein to remain in power by discouraging him from leaving Iraq.<sup>331</sup> This

argument is based on an invalid assumption since Saddam Hussein is already discouraged from leaving Iraq because of the international community's duty to prosecute or extradite him.<sup>332</sup>

Another concern is that war crimes trials may "interfere with international relations or exacerbate regional tensions."<sup>333</sup> This is obviously a political consideration balancing the effect of war crimes trials with any adverse impact they may have on international relations. However, the theft of a loaf of bread is not the crime at issue. Iraq has committed environmental war crimes of unprecedented proportions. Enforcing the rule of law is worth taking some risks of strained international relations.<sup>334</sup>

Others are concerned that war crimes trials may be turned on the United States and the coalition forces as a political weapon against them.<sup>335</sup> However, the coalition "need not fear the rule of law; it is a major objective of their foreign policy," and politicized trials should be rejected for the exhibitions that they are.<sup>336</sup> Finally, there is the concern over trials in absentia.<sup>337</sup> This is a misplaced concern. The failure to proceed with war crimes trials will significantly undermine deterrence. In contrast, a trial in absentia can be conducted in a fair manner with an aggressive defense presented by assigned counsel. A trial in absentia would support the rule of law and effective deterrence, and is a less difficult decision than the Security Council deciding to use force to support the rule of law in response to Iraqi

aggression.

#### E. Seeking Civil Reparations

Total Iraqi liability for damages that are a direct consequence of its invasion of Kuwait has been estimated to be from one hundred to nine hundred billion dollars.<sup>338</sup> Five of the thirteen Security Council Resolutions adopted on or before March 2, 1991,<sup>339</sup> reaffirmed the civil responsibility of Iraq established under the existing conventions and customary law previously discussed. A clear example of this affirmation is Security Council Resolution 674 of October 29, 1990, which:

*Reminds* Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.<sup>340</sup>

Additionally, Security Council Resolution 661 created an obligation of all States to freeze all Iraqi assets within their territories.<sup>341</sup> By freezing assets, this Resolution established one source of funds from which claims could be satisfied either by a national or an international commission.

United States domestic courts have jurisdiction to enforce international law for claims against those assets frozen in the United States. The Alien Tort Statute authorizes federal courts to adjudicate civil claims by aliens alleging acts in violation of the law of nations when the defendant is found in the United States.<sup>342</sup> The violation of the law of nations can be proscribed

either by convention or customary law.<sup>343</sup> Congress has the authority under the U.S. Constitution to enact further statutes creating specialized claims courts for frozen Iraqi assets.<sup>344</sup>

Iraq's civil liability under international law for any direct "damage, including environmental damage and the depletion of natural resources," was reaffirmed again on April 3, 1991, when the Security Council adopted its fourteenth resolution concerning the Persian Gulf crisis, Security Council Resolution 687.<sup>345</sup> Security Council Resolution 687 created a Compensation Commission to administer claims paid from a fund generated by Iraqi oil sales after April 2, 1991.<sup>346</sup> All revenue from these sales would be received by an escrow account, with thirty percent allocated to the Compensation Fund, and seventy percent allocated to Iraq for food, medicine, and other items for essential needs.<sup>347</sup> The current scheme is to recover approximately \$40 billion over the next ten years.<sup>348</sup> Consolidated claims of up to \$100,000 per person for death, personal injury, or property damage during the Iraqi invasion and occupation may be espoused by a claimant's State for a pro rata share of the available funds.<sup>349</sup> Further criteria is being formulated for additional categories of claims that will include environmental damage and loss of natural resources.<sup>350</sup>

In response to Security Council Resolution 687, the Minister for Foreign Affairs of Iraq stated the following in identical letters to the Secretary-

General and the President of the Security Council:

Further evidence of the resolution's [687] biased and iniquitous nature is that it holds Iraq liable for environmental damage and the depletion of natural resources, although this liability has not been established; on the other hand, it makes no mention of Iraq's own right to obtain compensation for the established facts of damage to its environment and the depletion of its natural resources . . .

These provisions partake of a desire to exact vengeance and cause harm, not to give effect to the relevant provisions of international law. The direct concrete consequences of their implementation will affect the potential and resources of millions of Iraqis, and deprive them of the right to live in dignity.<sup>351</sup>

On August 15, 1991, the Security Council authorized sales of up to \$1.6 billion of Iraqi oil over a period of six months.<sup>352</sup> Despite the starvation and lack of humanitarian supplies in Iraq, Saddam Hussein refuses to sell any oil.<sup>353</sup> Saddam Hussein has vowed that "Iraq would withstand U.N. sanctions for the next 20 years rather than accede to foreign control."<sup>354</sup>

#### F. Conclusions

The environmental destruction during the Persian Gulf War was a "glimpse of hell."<sup>355</sup> The unified response of the international community was as unprecedented as the environmental destruction itself. The outrage of the world has yielded a widespread demand for reparations and war crimes trials. The Security Council has done a superb job in seeking civil reparations, but it has not started any process to indict or prosecute Iraqi officials.

A clear legal basis and historical precedent exists to prosecute Saddam Hussein and other Iraqi defendants. The international law exists that



proscribes the atrocities afflicted on the Persian Gulf region, and Iraqi officials violated that law. Yet, there has been much agreement but no action. This inaction is attributable to the politicized decision making process that has filled the void created by the lack of a permanent, apolitical judicial mechanism that has as its function a duty to prosecute international crimes.

Although they were not able to establish a standing tribunal, the drafters of the 1949 Geneva Conventions recognized the inability of an ad hoc system to enforce sanctions.<sup>356</sup> The Gulf war has reinforced the importance of a permanent mechanism for determining criminal responsibilities. Notwithstanding the axiom that there is always room for improvement, this post-war legal examination reveals two observations. First, the current legal order proscribes environmental damage that is not justified by military necessity. Second, the environmental damage during the Persian Gulf War was the result of a fundamental failure of deterrence, *i.e.*, no mechanism exists to enforce the existing prohibitions. As discussed previously, proscriptive words alone are an insufficient deterrent.

## VII. IS A NEW CONVENTION REQUIRED?

*We all must keep in mind that international law lives in the practice of states and that the adoption of any single document is not going to be the definitive exposition of what international law is.*<sup>357</sup>

Geoffrey Greiveldinger  
Acting Assistant General Counsel,  
U.S. Department of Defense

#### A. A Proposed Convention: Underlying Fallacies

The environmentalist group Greenpeace International announced in March, 1991, that the Persian Gulf War demonstrates a need for a "Fifth Geneva Convention on the Protection of the Environment in the Time of Armed Conflict."<sup>358</sup> To discuss the merits of a proposed convention, Greenpeace International sponsored a round table conference in London on June 3, 1991.<sup>359</sup> The perceived need for a Proposed Geneva Convention No. V is based on the assumption that:

There is little in international law to protect the environment from the effects of war. What protection exists is limited and always of a lower priority than military objectives.<sup>360</sup>

This assumption, quite simply, is wrong. As discussed previously, the 1907 Hague Convention No. IV, the 1949 Geneva Convention No. IV, the 1977 Geneva Protocol I, and customary international law all proscribe the type of environmental damage which occurred during the Persian Gulf War.

Military necessity does not, as Greenpeace International suggests, always place environmental damage at a lower priority than military objectives. Quite to the contrary, military necessity allows:

[o]nly that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources.<sup>361</sup>

Military necessity only permits the destruction of property that is imperatively

demanding by the necessities of war.<sup>362</sup> The destruction of property includes environmental damage.<sup>363</sup>

The concept of a Proposed Geneva Convention No. V assumes that a weakness in the existing legal order is the cause of environmental damage during armed conflict. Such a concept overlooks fundamental principles of deterrence and assumes that just one more convention would prevent environmental damage during a future conflict.<sup>364</sup> Saddam Hussein's atrocities were not a failure of the existing legal order to effectively proscribe environmental damage; the cause was a perception of Saddam Hussein that the international community would not have the mettle to enforce the existing legal order. Greenpeace acknowledges these conclusions in its Conference Announcement in the following statement:

It is generally agreed, moreover, that Iraq, in deliberately creating the World's largest ever oil slick and in setting fire to almost all of Kuwait's oil wells, acted contrary to customary international law and bears responsibility as a state for compensating those who have suffered loss as a result.<sup>365</sup>

Nevertheless, Greenpeace International continues to advocate a new Geneva Convention to protect the environment.

#### B. Basic Requirements of a New Convention

Greenpeace International sets forth five basic requirements for their Proposed Geneva Convention No. V.<sup>366</sup> The first two are the requirements that military interests may not overrule environmental protection, and that no

environmental damage of a third-party State is permissible. These two requirements are simply untenable. They are based on the proposition that "there is a supreme international interest beyond the extreme national interest."<sup>367</sup> They place no threshold below which environmental damage is permissible and they destroy a State's inherent right of defense recognized in article 51 of the U.N. CHARTER. Such absolute prohibitions do not permit incidental or *de minimis* damage regardless of the imperatives of military necessity. Such requirements would impermissibly restrict a State's right to self-defense and offer no deterrence against aggression.<sup>368</sup>

The third requirement states that military action is to be ruled out if the environmental consequences are unknown or expected to lead to severe damage. Such a vague standard offers no workable guidelines for the fluid dynamics of warfighting. Does this requirement impose an obligation on the military commander to conduct an environmental impact statement prior to commencing any attack or defensive action? This would be clearly absurd. Perhaps this requirement, in a more reasonable interpretation, only requires that the commander consider the environmental damage during the conduct of hostilities. However, if that is the case, then the requirement offers no standards for balancing and the commander is back to considerations of military necessity.

Furthermore, the language "or expected to lead to severe damage" of the

third requirement suggests that some environmental damage that is not severe is permissible. This is contrary to the first two absolute requirements that no environmental damage is permissible. This makes the Greenpeace initiative unclear. Does Greenpeace desire to prohibit all environmental damage, or, will some level of damage be permissible depending on military necessities? This requirement is either absurd or offers no environmental protections that do not already exist.

The last two requirements are that the environment needs to be protected in all armed conflicts, not just a war to which the Geneva Conventions apply, and each party is responsible for the environmental damage it causes. These two requirements simply restate current international law. International law clearly establishes a responsibility to pay compensation for a violation of the law of armed conflict. Indeed, the international community has done a superb job holding Iraq accountable for the environmental damage during the Persian Gulf War. Furthermore, the existing laws of armed conflict apply in all situations of international armed conflict and military occupation. These two requirements add nothing to the current state of international law.

### C. A Needed Reform? An Appraisal

As discussed earlier, the United Nations Charter clearly prohibits aggression,<sup>369</sup> yet Saddam Hussein still invaded Kuwait. It is naive, if not

absurd, to believe that another piece of paper that restates the existing law would prevent any further intentional environmental damage as in Kuwait. Creating another convention proscribing environmental damage only adds to one element of the deterrence structure. What must be done, and what the proposed Fifth Geneva Convention does not do, is reinforce the remaining two elements. A criminal justice system which sets forth laws but does not condemn and punish illegal acts is ineffective. Similarly, an international norm that is not enforced defiles the legal order and undermines respect for the system. Consequently, changing the legal order by way of this Proposed Fifth Geneva Convention No. V will not accomplish effective deterrence.

What the legal order needs now to prevent future destruction is a clear message that such behavior will be punished. The Greenpeace proposal does not accomplish this objective. The goal of Greenpeace International is certainly laudable; however, the only workable requirements of the Proposed Geneva Convention No. V merely restate existing international law. Interestingly, one of the conclusions of the London Round Table Conference sponsored by Greenpeace was that "the rules of IHL [international humanitarian law] currently in force could substantially limit environmental damage, providing they are correctly complied with and fully respected."<sup>370</sup>

#### VIII. STRENGTHENING DETERRENCE: PROPOSED MECHANISMS

*The way to peace in this turbulent age is to . . . work with all our might*

*for the establishment of a structure of law that will be reliable and just to all nations. For though law alone cannot assure world peace, there can be no peace without it. Our national power and all the energies should operate in the light of that truth.*<sup>371</sup>

*Arthur Goldberg  
Former U.S. Ambassador to the U.N*

#### A. The Duty of the International Community

In his 1982 Annual Report of the United Nations, the Secretary-General stated that one of the greatest problems of the United Nations is a lack of respect for its decisions.<sup>372</sup> Certainly Saddam Hussein's invasion of Kuwait and his refusal to comply with one Security Council resolution after another has proved the former Secretary-General correct. Furthermore, if the Security Council and the international community does not demonstrate a commitment to enforcing its decisions, then blatant defiance is encouraged.

The Iraqi ruling elite are not suffering the hardships of the Iraqi people, and Saddam Hussein has demonstrated that he does not care that his own people are suffering. To the extent that economic sanctions, frozen assets, Iraqi oil revenues in escrow, and claims commissions can be effective, the Security Council has made a superb effort in seeking civil reparations. However, the only method to deter Saddam Hussein's sadistic misconduct is to get his attention in a personal way. Effective deterrence demands that someone prosecute Saddam Hussein and the other Iraqi war criminals.

This conclusion raises the obvious question. What is the mechanism, the

"structure of law" referred to by Ambassador Goldberg, that should be utilized to bring the Iraqi war criminals to trial? Article 146 of the 1949 Geneva Convention No. IV imposes on all nations an obligation to:

search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>373</sup>

However, the 1949 Geneva Conventions do not provide for a forum, they only provide for criminal liability.

There are many forums available that can try Iraqi war criminals. The preferred tribunal would be a permanent international court under the cognizance of the Security Council. However, if the international community fails to demonstrate its ability to work together to form an international tribunal, then article 146 of the 1949 Geneva Convention No. IV imposes an obligation on all States to prosecute Iraqi war criminals in their own national courts.

#### B. An International Tribunal

The international community should convene a tribunal that is above reproach "to document . . . charges precisely and incontrovertibly so that they are not diluted or trivialized by Saddam and his apologists."<sup>374</sup> There is considerable precedent for convening an international criminal court.



The very first international criminal court may have been in Germany in 1474 when twenty-seven judges of the Holy Roman Empire convicted Peter von Hagenbach for violations of the "laws of God and Man."<sup>375</sup> The League of Nations was interrupted by World War II in its attempt to create an international criminal court.<sup>376</sup> After World War II, the international tribunals at Nuremberg and Tokyo successfully prosecuted war criminals.<sup>377</sup>

U.N. General Assembly Resolution 95 (I), unanimously adopted in 1946, affirmed the principles of international law recognized by the Charter and Judgment of the International Military Tribunal at Nuremberg.<sup>378</sup> In 1948 the U.N. General Assembly first considered the possibility of an international criminal court.<sup>379</sup> In 1978 the American Bar Association advocated an international criminal court with jurisdiction limited to certain crimes of a terrorist nature.<sup>380</sup> However, over the years, formative issues of the court concerning composition, jurisdiction, procedural rules, applicable law, enforcement, and political complications have prevented the creation of an international criminal court.<sup>381</sup>

The Persian Gulf War has rekindled the world's interest in establishing an international criminal court.<sup>382</sup> In 1990, the 101st Congress passed House Concurrent Resolution 66 which stated in part that "[i]t is the sense of Congress that. . .the United States should explore the need for the establishment of an International Criminal Court on a universal or regional

basis to assist the international community in dealing more effectively with criminal acts defined in international conventions."<sup>383</sup> The House resolution required the President to report his efforts to establish an international criminal court, and required the Judicial Conference of the United States to report on the feasibility of, and the relationship to the Federal judiciary, of an international criminal court.<sup>384</sup> In 1991, the ABA created a task force to explore the establishment of an international criminal court.<sup>385</sup> There are several movements afoot to initiate an international criminal court after the blatant war crimes of the Persian Gulf War.

Several variations of an international tribunal are available.<sup>386</sup> The Security Council could create an international criminal court that has the coercive authority of the Security Council to enforce its judgments.<sup>387</sup> This option could be accomplished by expanding the jurisdiction of the current International Court of Justice, or by creating a separate court. If a new court is created, it could be a permanent court, or ad hoc for the limited purposes of trying war crimes that arose out of the Persian Gulf War.

Although both a permanent and an ad hoc court would serve as a deterrent, a permanent court would serve more effectively by facilitating future prosecutions. A permanent court and its investigative committee<sup>388</sup> would be an established mechanism that would begin to investigate, indict and prosecute, as appropriate, upon the report of an offense. It would not

depend upon the political convictions at the time. The ad hoc option is too dependent upon the political climate for success. To effectively serve deterrence, there should be an institutionalized international criminal court that will transcend daily political oscillation.

### C. A Role for the United States?

Without the leadership of the United States it is unlikely that there will be any international tribunal to prosecute Iraqi officials for war crimes.<sup>389</sup> Indeed, even with the initiative of the United States, such a tribunal is unlikely to succeed. In October, 1990, United States President George Bush publicly threatened Saddam Hussein with war crimes trials once the Persian Gulf War was over.<sup>390</sup> President Bush stated that:

What is at stake is whether the nations of the world can take a common stand against aggression or whether Iraq's aggression will go unanswered, whether we live in a world governed by the rule of law or by the law of the jungle.<sup>391</sup>

The United States has taken a stand against Iraqi aggression and was instrumental in freeing Kuwait from the horror of the Iraqi occupation. However, the task of strengthening the rule of law is not yet complete.

In the absence of the world community's ability to create a permanent international criminal court or to initiate the ad hoc requirements to begin war crime trials, the United States should take an active surrogate role. The United States currently has two options.

First, the United States and the coalition forces could create an ad hoc international tribunal similar to the International Military Tribunal at Nuremberg or Tokyo.<sup>392</sup> This tribunal could be convened by an agreement drawn up between the States willing to go forward with war crimes trials, but would not be created under the authority of the Security Council.

Second, the United States can prosecute suspected Iraqi war criminals in its own national courts under three bases of jurisdiction. Pursuant to article 18 of the Uniform Code of Military Justice, general courts-martial have jurisdiction to try "any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."<sup>393</sup> Article 21 of the Uniform Code of Military Justice recognizes the concurrent jurisdiction of general courts-martial with military tribunals established by the law of war.<sup>394</sup> Article 21 provides that:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.<sup>395</sup>

Section 3231 of title 18 of the United States Code grants jurisdiction in the federal district courts over "all offenses against the laws of the United States."<sup>396</sup>

Several interpretations of section 3231 of the U.S. Code would allow jurisdiction to federal district courts over violations of the law of war without

any further legislation.<sup>397</sup> However, this does not seem to be a widely held position. A textual reading of these provisions and title 18 make it clear that federal district courts would not have jurisdiction for extraterritorial violations of the laws of war as such. Under the current statutory scheme, federal district courts would only have jurisdiction over violations of the laws of war if they violated some other federal law within the territory of the United States. Since Congress has the power to define and punish offenses against the Law of Nations,<sup>398</sup> it would be prudent to enact implementing legislation should the United States decide to prosecute war crimes in federal district courts.

The Security Council and the International Court of Justice can be utilized to facilitate war crimes trials in United States domestic courts. The United States could request extradition of Iraqi war criminals. If Iraq refuses to either prosecute or extradite, then Iraq could be brought before the International Court of Justice for a breach of its obligation to prosecute or extradite under article 146 of the 1949 Geneva Convention No. IV. Although the International Court of Justice is not a criminal court, it has jurisdiction to settle disputes concerning the interpretation of a treaty. If the International Court of Justice rules that Iraq has breached its duty to prosecute or extradite, then article 94 of the U.N. CHARTER could be invoked to seek enforcement of the Court's ruling. Article 94 of the U.N.

CHARTER provides:

[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.<sup>399</sup>

This article would permit the Security Council to use Chapter VII of the U.N. CHARTER to enforce the ruling of the court.<sup>400</sup>

If jurisdiction cannot be obtained over Iraq in the International Court of Justice, then the United States can apply directly to the Security Council to enforce Iraq's obligation to prosecute or extradite. Prior to any enforcement action the Security Council would have the option of requesting an advisory opinion from the International Court of Justice.<sup>401</sup>

Once again, the preferred option is prosecution by a tribunal under the cognizance of the Security Council. If that is not possible, then the United States should be the moving force behind an international ad hoc tribunal convened similarly to that of Nuremberg. If both of these options fail, then the United States should prosecute suspected Iraqi war criminals in its own domestic courts.

## IX. CONCLUSIONS AND RECOMMENDATIONS

*Choice of forum, not absence of forum, and the desirability of in absentia prosecution, not absence of law, appear as the current legal issues on war crimes trials.*<sup>402</sup>

*Report of the United States Senate,*

*Committee on Environment and Public Works*

There is an impermissible level of environmental damage that goes beyond what the international legal and moral conscience permits during armed conflict. This impermissible level of environmental damage is defined by the principle of military necessity. To effectively deter future environmental damage, the world community needs to aggressively seek condemnation for all environmental damage not justified by military necessity.

If the international community does not now enforce the rule of law, it has significantly undermined the deterrent effect of the existing rules of armed conflict. Despite the pronouncements and resolutions of the world community, a tribunal to prosecute Iraqi officials for the intentional and unnecessary damage that occurred in Kuwait has not been convened. This failure to hold Iraqi officials accountable should be attributed to the lack of a formal, institutionalized mechanism, such as an international judiciary or coercive commission, which has the obligation to investigate and pursue criminal action, and the authority to effectively enforce the law.

Protecting the environment during armed conflict is a particularly vexing dilemma because of the inherent destructive nature of war; however, the existing legal order proscribes environmental damage during armed conflict not justified by military necessity. If unenforced, a new convention that proscribes environmental damage during armed conflict would be of no more

deterrent value than the existing regime.

The massive and vindictive environmental destruction by Iraq during the Persian Gulf War is a clear violation of the existing laws of armed conflict. International law supports criminal responsibility and State accountability. Effective deterrence demands criminal responsibility and State accountability. The United Nations has done a superb job in demanding and actively seeking reparations. What then is the obstacle to war crimes trials?

The quote at the beginning of this part taken from the report of the U.S. Senate accurately identifies the essence of the stumbling block. It is not an issue of there being no forum or jurisdiction; it is an issue of trying to decide which forum to utilize. It is not an issue of there being no offense because no law has been violated; it is an issue of trying to decide whether or not to try the Iraqi officials in absentia. However, this quote implicitly identifies the crux of the problem. Who is to decide the issues of forum selection and of proceeding by a trial in absentia?

The essence of the problem is that the international community should have an apolitical, judicial mechanism to make these decisions. Such a mechanism will establish a forum and ensure that the decisions made will reflect the international community's sense of equity and conscience. However, some believe that if the United States does not take the lead there will be no war crimes trials.



With or without the lead of the United States, it seems unlikely in this politically egocentric world that any permanent international judicial mechanism will be established that will have the authority to take coercive action against a sovereign over its objection. Until such time, the United States should take a lead role in establishing an effective deterrent by convening an ad hoc international or national tribunal to aggressively obtain indictments and prosecute, in absentia if necessary, all violators.

Although the focus of this paper has been the proscription of environmental damage during armed conflict, this recommendation to establish a permanent international tribunal, and in the alternative, an ad hoc international tribunal, a regional or national tribunal, is equally applicable for the prosecution of all other international criminal acts. Quite simply, a law that is not enforced does not demand or deserve respect.

## ENDNOTES

<sup>1</sup>*al Qur'an* 25:63, reprinted in WILLIAM M. ARKIN ET AL., ON IMPACT: MODERN WARFARE AND THE ENVIRONMENT--A CASE STUDY OF THE GULF WAR (forthcoming 1992) (manuscript at iii, on file with Greenpeace International, London, Eng.).

<sup>2</sup>See JOHN N. MOORE, LAW AND THE GRENADA MISSION 1-2, 3 n.3 (1984).

<sup>3</sup>See, e.g., James P. Terry, *The Environment and the Laws of War: The Impact of Desert Storm*, NAVAL WAR C. REV., Vol. XLV, No. 1, Winter 1992, at 61. Colonel Terry concludes in his study that an environmental protective regime that is too restrictive may prohibit the use of modern weapons which have some inherent incidental and collateral environmental impact. Not only would such a regime impair a nation's right to self-defense while offering no deterrence against aggression, it would fail to protect the environment in the long term.

<sup>4</sup>See John N. Moore, *Morality and the Rule of Law in the Foreign Policy of the Democracies* (Nov. 5, 1991) (unpublished manuscript, on file with author at the University of Virginia School of Law) for an analysis of the causes of war which challenges traditional international thought. Professor Moore's thesis is that "a major causative model of the principal international

wars in the twentieth century consists of a synergy between a non-democratic regime bent on the aggressive use of force for value extension and an overall system-wide failure to deter such aggression." *Id.* at 6. *But see* ARKIN ET AL., *supra* note 1, at 21-24 for a discussion which suggests that the laws of armed conflict are inadequate in controlling not only war but the conduct of war as well.

<sup>5</sup>U.N. CHARTER art. 2, ¶ 4 provides "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *See also* United Nations Security Council Resolution 660 (Aug. 2, 1990) [hereinafter U.N. Doc. S/RES/660 (1990)], *reprinted in* THE KUWAIT CRISIS: BASIC DOCUMENTS 88 (E. Lauterpacht et al. eds., 1991) [hereinafter THE KUWAIT CRISIS]; JOHN N. MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW (forthcoming 1992, Oceana, Inc.) (manuscript at 21, on file with author at the University of Virginia School of Law) ("Iraq's blitzkrieg invasion and attempted annexation of Kuwait and related Iraqi actions in the Gulf crisis stand in profound opposition to the rule of law."); Jeffrey F. Addicott, *The United States of America, Champion of the Rule of Law or the New World Order?* FLA. J. INT'L L. (forthcoming 1992) (manuscript at 26, on file with

author at The Judge Advocate General's School, Charlottesville, VA) ("The fact that Iraq was a member of the United Nations and bound by the principles relating to dispute settlement through means other than the use of force had no effect whatsoever on its activities.").

<sup>6</sup>Interestingly, Saddam Hussein's invasion of Kuwait violated Islamic law as well. See A. An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 317 (1987) (An-Na'im explains that any war not designed to propagate Islam violates Islamic law.), noted in R. Peter Masterton, *The Persian Gulf War Crimes Trials*, ARMY LAW., June 1991, at 9 n.25.

<sup>7</sup>See Addicott, *supra* note 5, at 25 (This author discusses that authoritative words unsupported by effective power creates such a deterrence failure that "Iraq made no real attempt to even conceal, let alone justify, its violations of . . . [international law].").

<sup>8</sup>See discussion *infra* part VI.A for a detailed account of the environmental damage. Although this study focuses on the proscription of environmental damage, it is not intended to belittle the Iraqi human rights violations. Indeed, the environmental damage pales in comparison to the savage human rights violations. For a more detailed description of the Iraqi torture, maiming, rape, summary executions, and mass extrajudicial killings

of men, women, children, and infants, *see generally* MOORE, *supra* note 5; ARKIN ET AL., *supra* note 1.

<sup>9</sup>See DOCUMENTS ON THE LAWS OF WAR 12 (Adam Roberts & Richard Guelff eds., 2d ed. 1989) [hereinafter LAWS OF WAR].

<sup>10</sup>See *infra* part III.A.4 for a discussion supporting this proposition.

<sup>11</sup>Robert F. Turner, *Don't Let Saddam Escape Without Trial*, ATLANTA J./ATLANTA CONST., Aug. 31, 1991, at B2.

<sup>12</sup>ARKIN ET AL., *supra* note 1, at 5.

<sup>13</sup>See Addicott, *supra* note 5, at 26 ("words without corresponding force have little effect in the deterrence of unlawful activities").

<sup>14</sup>Wm. F. Buckley Jr., *Get Saddam Hussein*, NAT'L REV., May 27, 1991, at 62.

<sup>15</sup>THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 21 (1987).

<sup>16</sup>See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a), 59 Stat. 1055, T.S. No. 993 [hereinafter I.C.J. Statute]. Although article 38 is silent concerning the hierarchy of precedence of the sources of international law, the principles of customary international law found in the Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 [hereinafter V.C.T.], reprinted in OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF AIR FORCE, PAM. 110-20, SELECTED INTERNATIONAL

AGREEMENTS, ch. 7, at 2 (1981) [hereinafter AFP 110-20], are instructive. Article 26 describes the obligation of *pacta sunt servanda* which requires a State to follow treaties in force to which they are a party. Article 53 recognizes that treaties preempt conflicting customary international law except when the customary international law embodies a peremptory norm of general international law (the latter being the principle of *jus cogens*). V.C.T., *supra*. See also, JOSEPH M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM 23 (2d ed. 1981) ("In the last century the situation has changed and it [customary international law] has been relegated to second place by the treaty.").

<sup>17</sup>V.C.T., *supra* note 16, arts. 6-17, 24, 25, 34-37.

<sup>18</sup>North Sea Continental Shelf Cases (F.R.G. v. Den.) (F.R.G. v. Neth.) 1969 I.C.J. 4. See also V.C.T., *supra* note 16, art. 38 ("Nothing . . . precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.").

<sup>19</sup>I.C.J. Statute, *supra* note 16, art. 38(1)(b).

<sup>20</sup>North Sea Continental Shelf Cases (F.R.G. v. Den.) (F.R.G. v. Neth.) 1969 I.C.J. 4.

<sup>21</sup>I.C.J. Statute, *supra* note 16, art. 38(1)(c); Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22.

<sup>22</sup>See *infra* part III.A.4 for a discussion supporting this proposition.

<sup>23</sup>LAWS OF WAR, *supra* note 9, at 1. These laws apply during armed conflict regardless of whether the conflict is lawful or unlawful in its inception. *Id.*

<sup>24</sup>*Id.* at 1-2.

<sup>25</sup>OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 5.2 (1989) [hereinafter COMMANDER'S HANDBOOK (SUPP.)].

<sup>26</sup>AFP 110-20, *supra* note 16, ch. 3, at 1.

<sup>27</sup>LAWS OF WAR, *supra* note 9, at 35.

<sup>28</sup>*Id.* at 17, 43.

<sup>29</sup>*Id.* at 17, 35, 43.

<sup>30</sup>*Id.* at 43. The three 1899 Hague Conventions were revised during this conference. *Id.*

<sup>31</sup>Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 4, 36 Stat. 2277, 75 U.N.T.S. 287 [hereinafter 1907 Hague Convention No. IV], *reprinted in* LAWS OF WAR, *supra* note 9, at 44; *See also* LAWS OF WAR, *supra* note 9, at 43-44. There were eighteen States who were parties to the 1899 convention that did not become parties to the 1907 convention. These eighteen States remain bound by the 1899 convention. *Id.* at 44.

<sup>32</sup>LAWS OF WAR, *supra* note 9, at 42-59.

<sup>33</sup>*Id.* at 10.

<sup>34</sup>1907 Hague Convention No. IV, *supra* note 31, art. 2.

<sup>35</sup>LAWS OF WAR, *supra* note 9, at 44.

<sup>36</sup>*Iraq*, 21 THE NEW ENCYCLOPEDIA BRITANNICA 899, 944 (15th ed. 1991). The area now known as Iraq was long known as Mesopotamia, with civilized development recorded as early as 10,000 BC. It was the site of the world's first urban, literate civilization as early as 3500 BC. Later, approximately 1750 BC, Mesopotamia developed into two regions known as Babylonia and Sumeria, where the world's first legal codes, the "Code of Hammurabi" of Babylonia and the "Code of Lipit-Ishtar" of Sumeria, were developed. After the Arab conquest in the 7th Century, "Iraq" became a geographical expression for the flatlands between Baghdad and the Persian Gulf. After many years of strife in the Ottoman Empire and under British rule, Iraq became an independent State in 1932. *Id.* at 906-45.

<sup>37</sup>LAWS OF WAR, *supra* note 9, at 58-59.

<sup>38</sup>IRAQ: A COUNTRY STUDY 32 (Helen C. Metz ed., 4th ed. 1990).

<sup>39</sup>THE KUWAIT CRISIS, *supra* note 5, at 45.

<sup>40</sup>LAWS OF WAR, *supra* note 9, at 58-9.

<sup>41</sup>*Id.* at 44.

<sup>42</sup>*See* 1907 Hague Convention No. IV, *supra* note 31.



<sup>43</sup>*Id.* pmb1.

<sup>44</sup>Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 75 U.N.T.S. 287 [hereinafter 1907 Hague Regulations].

<sup>45</sup>LAWS OF WAR, *supra* note 9, at 5. For a more in depth discussion of the principles of proportionality and discrimination, and their corollary principles of military necessity, humanity, and chivalry, see the discussion in part III.B, *infra*.

<sup>46</sup>1907 Hague Regulations, *supra* note 44, art. 23(a).

<sup>47</sup>*Id.* art. 23(e).

<sup>48</sup>See 1907 Hague Regulations, *supra* note 44.

<sup>49</sup>See LAWS OF WAR, *supra* note 9, at 4.

<sup>50</sup>1907 Hague Regulations, *supra* note 44, art. 22.

<sup>51</sup>See 1907 Hague Regulations, *supra* note 44, arts. 23-28.

<sup>52</sup>*Id.* art. 23.

<sup>53</sup>See *infra* part III.C.1 for a discussion of the component parts of the environment.

<sup>54</sup>1907 Hague Regulations, *supra* note 44, art. 55.

<sup>55</sup>Terry, *supra* note 3, at 66 n.5.

<sup>56</sup>1907 Hague Convention No. IV, *supra* note 31, art. 3.

<sup>57</sup>1907 Hague Regulations, *supra* note 44, arts. 53, 56. Article 53 provides that property seized by an army of occupation "must be restored and compensation fixed when peace is made." *Id.* art. 53. Article 56 provides that "[a]ll seizure of, destruction or wilful damage done to institutions of this character [those dedicated to religion, charity and education] historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." *Id.* art. 56. A seizure of property "requires both an intent to take such action and a physical act of capture . . ." DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ¶ 395 (1956) [hereinafter FM 27-10].

<sup>58</sup>1907 Hague Convention No. IV, *supra* note 31, art. 1.

<sup>59</sup>1907 Hague Regulations, *supra* note 44, art. 1.

<sup>60</sup>LAWS OF WAR, *supra* note 9, at 169.

<sup>61</sup>*Id.* at 193. This convention, which was never ratified and did not enter into force, was intended to extend to naval forces the protections of the 1864 Geneva Convention on the wounded. *Id.*

<sup>62</sup>*Id.* at 170. The 1906 Geneva Convention greatly expanded and replaced the 1864 Geneva Convention. *Id.*

<sup>63</sup>*Id.* at 170. The 1929 Geneva Convention slightly revised and replaced the 1906 Geneva Convention. *Id.*

<sup>64</sup>*Id.* at 169.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 387.

<sup>68</sup>*Id.* After World War II, many hostilities were not neatly defined as international in character, and the increase in guerrilla warfare gave rise to questions concerning the traditional definition of combatants. These concerns were the changing conditions that gave impetus to the 1977 Geneva Protocols. *Id.*

<sup>69</sup>*Id.* at 387-88, 447.

<sup>70</sup>Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention No. IV], *reprinted in* LAWS OF WAR, *supra* note 9, at 272.

<sup>71</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter 1977 Geneva Protocol I], *reprinted in* LAWS OF WAR, *supra* note 9, at 389.

<sup>72</sup>LAWS OF WAR, *supra* note 9, at 169-337, 387-446. Although not relevant to the invasion of Kuwait by Saddam Hussein, a controversial provision of the 1977 Geneva Protocol I is its expanded definition of international armed conflict which includes those conflicts "in which people are fighting against colonial domination and alien occupation and against

racist regimes in the exercise of their right of self-determination." *See id.* at 388.

<sup>73</sup>*Id.* at 10.

<sup>74</sup>*Id.* at 328.

<sup>75</sup>*Id.* at 170.

<sup>76</sup>*Id.* at 460. A contracting State "means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force." V.C.T., *supra* note 16, art. 2.1(f).

<sup>77</sup>LAWS OF WAR, *supra* note 9, at 462. Although the United States signed both Protocols on December 12, 1977, subject to several understandings, the United States never ratified either of them. *Id.* at 459-68.

<sup>78</sup>*Id.* at 460.

<sup>79</sup>MOORE, *supra* note 5, at 81. *See also* Paul C. Szasz, Remarks During a Panel Discussion on *The Gulf War: Environment as a Weapon*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 215, 217 who concludes that "nature is no longer fair game in mankind's conflicts."

<sup>80</sup>1949 Geneva Convention No. IV, *supra* note 70, art. 2. It should be noted that Iraq did make claims that Kuwait was actually its 19th Province. If these claims were valid, then the laws of occupation would not apply. However, Professor Moore has concluded that the Iraqi claims are factually

preposterous. See generally MOORE, *supra* note 5, at 201-223. The N.Y. TIMES notes that "Iraq's claims to Kuwait have been repeatedly examined, and repeatedly dismissed by other Arab states, by the Soviet Union . . . and by a host of qualified scholars, some even calling the claim frivolous." *The Big Lie About Kuwait*, N.Y. TIMES, Nov. 2, 1990, at A34, *noted in* MOORE, *supra* note 5, at 212, 243 n.62. Furthermore, United Nations Security Council Resolution 662 provided that the "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void." United Nations Security Council Resolution 662 (Aug. 9, 1990), *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 90.

<sup>81</sup>1949 Geneva Convention No. IV, *supra* note 70, art. 6.

<sup>82</sup>*Id.* art. 53.

<sup>83</sup>1977 Geneva Protocol I, *supra* note 71, art. 3. See *supra* note 72 for a brief discussion on a controversial provision of the 1977 Geneva Protocol I which expands the definition of international armed conflict.

<sup>84</sup>1977 Geneva Protocol I, *supra* note 71, art. 35(3).

<sup>85</sup>LAWS OF WAR, *supra* note 9, at 378.

<sup>86</sup>1977 Geneva Protocol I, *supra* note 71, art. 55.

<sup>87</sup>See 1907 Hague Regulations, *supra* note 44, art. 23(g).

<sup>88</sup>See 1949 Geneva Convention No. IV, *supra* note 70, art. 53.

<sup>89</sup>1977 Geneva Protocol I, *supra* note 71, art. 57.2(a)(iii).

<sup>90</sup>1949 Geneva Convention No. IV, *supra* note 70, art. 147. A grave breach is one specified in article 147 of the Convention. All other violations are considered to be simple breaches of the Convention. The functional distinction is in the obligation of the States *vis-a-vis* the type of breach which has occurred. *Id.* arts. 146-47.

<sup>91</sup>*Id.* arts. 146, 148.

<sup>92</sup>*See* Terry, *supra* note 3, at 65.

<sup>93</sup>1977 Geneva Protocol I, *supra* note 71, art. 85(3)(b).

<sup>94</sup>*Id.* art. 57.2(a)(iii).

<sup>95</sup>*Id.* arts. 85-87.

<sup>96</sup>*Id.* art. 91.

<sup>97</sup>*Id.* art. 36.

<sup>98</sup>LAWS OF WAR, *supra* note 9, at 377. The impetus for this resolution was the use of defoliation and weather manipulation techniques utilized by the United States in Vietnam. *Id.*

<sup>99</sup>The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151 [hereinafter 1977 ENMOD Convention], *reprinted in* LAWS OF WAR, *supra* note 9, at 379. The United States ratified the 1977 ENMOD Convention on Jan. 17, 1980. *Id.* at 384.

<sup>100</sup>See LAWS OF WAR, *supra* note 9, at 377-383. Contrast this purpose with that of the 1977 Geneva Protocol I, which prohibits damage to the environment regardless of the weapon used. *Id.* at 378.

<sup>101</sup>1977 ENMOD Convention, *supra* note 99, art. IV.

<sup>102</sup>LAWS OF WAR, *supra* note 9, at 384.

<sup>103</sup>See V.C.T., *supra* note 16, art. 18. Iraq is not a party to the Vienna Convention on the Law of Treaties. AFP 110-20, *supra* note 16, app. 1. However, the Vienna Convention on the Law of Treaties is declaratory of customary international law. See SWEENEY ET AL., *supra* note 16, at 951.

<sup>104</sup>See Terry, *supra* note 3, at 64.

<sup>105</sup>Although no source concludes that the 1977 ENMOD Convention is customary international law, see Szasz, *supra* note 79, at 216-17 who concludes that the environmental protective principles in the 1977 ENMOD Convention are emerging principles of customary law.

<sup>106</sup>1977 ENMOD Convention, *supra* note 99, art. I.1.

<sup>107</sup>*Id.* art. II.

<sup>108</sup>LAWS OF WAR, *supra* note 9, at 378.

<sup>109</sup>1977 ENMOD Convention, *supra* note 99, pmb.

<sup>110</sup>*Id.* art. II.

<sup>111</sup>LAWS OF WAR, *supra* note 9, at 378.

<sup>112</sup>*Id.* at 377.

<sup>113</sup>See *supra* part III.A.2.c.

<sup>114</sup>See LAWS OF WAR, *supra* note 9, at 4.

<sup>115</sup>1977 ENMOD Convention, *supra* note 99, art. I.1.

<sup>116</sup>*Id.* art. V.

<sup>117</sup>*Id.*

<sup>118</sup>LAWS OF WAR, *supra* note 9, at 378.

<sup>119</sup>1977 ENMOD Convention, *supra* note 99, pmb.

<sup>120</sup>Indeed, article 2 of the 1949 Geneva Convention No. IV provides that its provisions are "[i]n addition to the provisions which shall be implemented in peacetime . . ." 1949 Geneva Convention No. IV, *supra* note 70, art. 2.

<sup>121</sup>V.C.T., *supra* note 16, art. 61 for a discussion of this defense.

<sup>122</sup>It is certainly beyond the realm of argument that any State would give up their inherent right of self-defense in any treaty.

<sup>123</sup>DEPT OF ARMY, PAM. 27-161-1, LAW OF PEACE, VOLUME I, ¶ 8-34 (1979) [hereinafter DA PAM. 27-161-1].

<sup>124</sup>*Id.* ¶ 8-34.

<sup>125</sup>V.C.T., *supra* note 16, art. 73.

<sup>126</sup>*Id.* art. 56.

<sup>127</sup>DEPT OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW, VOLUME II, at 38 (1962) (hereinafter DA PAM. 27-161-2).

<sup>128</sup>See *Clark v. Allen*, 331 U.S. 503, 508-9, 67 S.Ct. 1431 (1947).



<sup>129</sup>V.C.T., *supra* note 16, art. 62.

<sup>130</sup>FM 27-10, *supra* note 57, ¶ 512.

<sup>131</sup>United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 [hereinafter 1982 LOS Convention], *reprinted in* UNITED NATIONS, THE LAW OF THE SEA 1 (1983).

<sup>132</sup>Bernardo Zuleta, *Introduction to UNITED NATIONS, THE LAW OF THE SEA*, xix (1983).

<sup>133</sup>*Id.*

<sup>134</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 1.1. Sixty instruments of ratification or accession must be deposited before the 1982 LOS Convention enters into force. 1982 LOS Convention, *supra* note 131, art. 308. Although 159 States (of approximately 170 total) signed the 1982 LOS Convention, as of March, 1989, only 40 States have ratified the convention. COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 1.1 n.3.

<sup>135</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 1.1 tbl. ST1-1.

<sup>136</sup>V.C.T., *supra* note 16, art. 18.

<sup>137</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 1.1 n.5.

<sup>138</sup>*See, e.g.*, 1982 LOS Convention, *supra* note 131, art. 25(3) which provides for the suspension of innocent passage when in the national security interests of the coastal State.

<sup>139</sup>*Id.* arts. 192-237.

<sup>140</sup>*Id.* art. 192.

<sup>141</sup>*Id.* art. 194.

<sup>142</sup>*See id.* art. 207 ("States shall take other measures as may be necessary . . . to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment.").

<sup>143</sup>*See id.* art. 210 ("[State] . . . laws, regulations and measures shall ensure that dumping is not carried out without the permission of the competent authorities of [coastal and affected] States.").

<sup>144</sup>*See id.* art. 211 (imposes a general duty to adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels under their control).

<sup>145</sup>*See id.* art. 212 (imposes a general duty to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the airspace under its control).

<sup>146</sup>*See id.* arts. 31, 42(5).

<sup>147</sup>*See id.* art. 235.

<sup>148</sup>For example, an enemy warship passing through the territorial waters of a warring State can no longer claim, by definition, a right of innocent passage. *See id.* arts. 17-32.

<sup>149</sup>Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter 1958 Convention on the High Seas], *reprinted in* AFP 110-20, *supra* note 16, ch. 6, at 58.

<sup>150</sup>*See* 1958 Convention on the High Seas, *supra* note 149, arts. 24-29.

<sup>151</sup>Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

<sup>152</sup>Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3.

<sup>153</sup>SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS - GULF POLLUTION TASK FORCE, THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, at ii (Mar. 4, 1992) [hereinafter THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR].

<sup>154</sup>*See supra* part III.

<sup>155</sup>LAWS OF WAR, *supra* note 9, at 2.

<sup>156</sup>*Id.* at 3-4.

<sup>157</sup>*Id.* at 4.

<sup>158</sup>*Id.* at 4-6.

<sup>159</sup>*Id.* at 6.

<sup>160</sup>Szasz, *supra* note 79, at 217.

<sup>161</sup>*Id.* at 216-17.

<sup>162</sup>LAWS OF WAR, *supra* note 9, at 4.

<sup>163</sup>See, e.g., 1907 Hague Regulations, *supra* note 44, art. 22.

<sup>164</sup>LAWS OF WAR, *supra* note 9, at 4-5.

<sup>165</sup>*Id.*

<sup>166</sup>*Id.* at 5.

<sup>167</sup>*Id.*

<sup>168</sup>*Id.*

<sup>169</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2. Military necessity is defined by the United States Army "as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." FM 27-10, *supra* note 57, ¶ 3.a.

<sup>170</sup>MOORE, *supra* note 5, at 158.

<sup>171</sup>DA PAM. 27-161-2, *supra* note 127, at 248.

<sup>172</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2.

<sup>173</sup>*Id.*

<sup>174</sup>*Id.*

<sup>175</sup>*Id.* ¶ 8.1.1.

<sup>176</sup>*Id.* Military objectives are defined by the United States Army as "combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at

the time, offers a definite military advantage." FM 27-10, *supra* note 57, ¶ 40.c.

<sup>177</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2. The United States Army incorporates article 23(e) of the 1907 Hague Regulations to define unnecessary suffering. Article 23(e) provides "it is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering." FM 27-10, *supra* note 57, ¶ 34.

<sup>178</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶¶ 9.1.1-9.1.2.

<sup>179</sup>*Id.* ¶ 5.2.

<sup>180</sup>*Id.*

<sup>181</sup>*Id.*

<sup>182</sup>*See* DA PAM. 27-161-2, *supra* note 127, at 15-16.

<sup>183</sup>*See* COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2 & ch. 12; FM 27-10, *supra* note 57, ¶¶ 48-55.

<sup>184</sup>FM 27-10, *supra* note 57, ¶ 49.

<sup>185</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 12.1.2. An act of perfidy prohibited by the principle of chivalry is feigning surrender to lure the enemy into a trap. *Id.*

<sup>186</sup>*See supra* part III.A.3.

<sup>187</sup>*See supra* part III.A.3.C.

<sup>188</sup>In the laws of war, there are very few absolute rules which do not

provide for an exception for circumstances of military necessity. An example of one such absolute prohibition is the rule which prohibits the killing of prisoners of war. See COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 5.2 n.5.

<sup>189</sup>LAWS OF WAR, *supra* note 9, at 1.

<sup>190</sup>*Id.* at 1, 12.

<sup>191</sup>The Prize Cases, 67 U.S. (2 Black) 635 (1862), *noted in* NATIONAL SECURITY LAW 71, 72-73 (Stephen Dycus et al. eds.) (1990).

<sup>192</sup>LAWS OF WAR, *supra* note 9, at 1.

<sup>193</sup>See NATIONAL SECURITY LAW 318 (John N. Moore et al. eds., 1990); LAWS OF WAR, *supra* note 9, at 1-2.

<sup>194</sup>NATIONAL SECURITY LAW, *supra* note 193, at 318.

<sup>195</sup>See Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Inst. of Int'l Law Res., Wiesbaden Sess. (Aug. 13, 1975) [hereinafter Condition of Application of Rules], *reprinted in* THE LAWS OF ARMED CONFLICTS 907 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter LAWS OF ARMED CONFLICTS]; Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, Inst. of Int'l Law Res., Zagreb Sess. (Sept. 3, 1971)

[hereinafter Condition of Application of Humanitarian Rules], *reprinted in* LAWS OF ARMED CONFLICTS, *supra*, at 903.

<sup>196</sup>LAWS OF ARMED CONFLICTS, *supra* note 195, at 903.

<sup>197</sup>*Id.*

<sup>198</sup>*Id.*

<sup>199</sup>*See* Condition of Application of Rules, *supra* note 195, arts. 2, 4; Condition of Application of Humanitarian Rules, *supra* note 195, art. 2.

<sup>200</sup>*See* Hague Convention No. III Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. 539, *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 57.

<sup>201</sup>*Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, princ. I, [1950] 2 Y.B. Int'l L. Comm'n 374 [hereinafter *1950 Nuremberg Principles*], *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 923.

<sup>202</sup>LAWS OF WAR, *supra* note 9, at 12.

<sup>203</sup>*1950 Nuremberg Principles*, *supra* note 201, prins. III, IV.

<sup>204</sup>Opinion and Judgment of the International Military Tribunal, Nuremberg, Sept. 30, 1946, 22 T.M.W.C. 411, extracts *reprinted in* LAWS OF WAR, *supra* note 9, at 155.

<sup>205</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ S6.2.5.7.

<sup>206</sup>LAWS OF WAR, *supra* note 9, at 11.

<sup>207</sup>DA PAM. 27-161-2, *supra* note 127, at 222. Germany refused the Allied extradition request for 896 suspected German war criminals. Instead, forty-five names were chosen to be tried by the Criminal Senate of the Imperial Court of Justice of Germany. Of these forty-five, only twelve were tried. Six of these twelve were acquitted, and the other six received light sentences. *Id.* at 221-22.

<sup>208</sup>LAWS OF WAR, *supra* note 9, at 11.

<sup>209</sup>DA PAM. 27-161-2, *supra* note 127, at 222.

<sup>210</sup>*Id.*

<sup>211</sup>Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter 1945 London Agreement], *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 911.

<sup>212</sup>DA PAM. 27-161-2, *supra* note 127, at 223-24.

<sup>213</sup>Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1545, 82 U.N.T.S. 280 [hereinafter 1945 Charter of the IMT], *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 913.

<sup>214</sup>DA PAM. 27-161-2, *supra* note 127, at 224. Of the twenty-four defendants, nineteen were convicted of at least one of the four counts alleged, and three were found not guilty. One defendant committed suicide before trial, and one was not tried because of old age. *Id.* at 226.



<sup>215</sup>*Id.* at 224.

<sup>216</sup>*Id.* at 226-27.

<sup>217</sup>LAWS OF WAR, *supra* note 9, at 6. *See also* DA PAM. 27-161-2, *supra* note 127, at 224.

<sup>218</sup>DA PAM. 27-161-2, *supra* note 127, at 235. Of these 1672 accused, 1416 were convicted. *Id.*

<sup>219</sup>*Id.* at 233.

<sup>220</sup>*Id.* at 234.

<sup>221</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶¶ S6.2.5.2-S6.2.5.3.

<sup>222</sup>*See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention No. I], *reprinted in* LAWS OF WAR, *supra* note 9, at 171; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention No. II], *reprinted in* LAWS OF WAR, *supra* note 9, at 194; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention No. III], *reprinted in* LAWS OF WAR,

*supra* note 9, at 216; 1949 Geneva Convention No. IV, *supra* note 70, art. 146; 1977 ENMOD Convention, *supra* note 99, art. IV.

<sup>223</sup>U.N. CHARTER art. 1 sets forth the purposes of the United Nations.

<sup>224</sup>*See* U.N. CHARTER arts. 29, 39, 41; John N. Moore & Robert F. Turner, *Apply the Rules of Law*, INT'L HERALD TRIB., Sept. 12, 1990, at 12.

<sup>225</sup>*See* MOORE, *supra* note 5, at 306; Moore & Turner, *supra* note 224, at 12.

<sup>226</sup>1945 Charter of the IMT, *supra* note 213, art. 1.

<sup>227</sup>*Id.* arts. 1-30.

<sup>228</sup>*See* U.N. CHARTER art. 53, ¶ 1.

<sup>229</sup>Other options of prosecuting Persian Gulf war criminals will be discussed in part VIII, *infra*.

<sup>230</sup>1945 Charter of the IMT, *supra* note 213, art. 12.

<sup>231</sup>DA PAM. 27-161-2, *supra* note 127, at 226.

<sup>232</sup>*Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95 (I), 1st Sess., pt. 2, (Dec. 11, 1946), *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 195, at 921.

<sup>233</sup>MOORE, *supra* note 5, at 305.

<sup>234</sup>*Id.* at 299.

<sup>235</sup>Louis R. Beres, *Toward Prosecution of Iraqi Crimes Under International Law: Jurisprudential Foundations and Jurisdictional Choices*, 22 CAL. W. INT'L

L.J. 127, 129 (1991). There is no statute of limitations for war crimes. See COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ S6.2.5.3.

<sup>236</sup>Case Concerning the Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No.17, *quoted in* Robert F. Turner, *Justice: What Iraq Owes Its Victims*, WASH. POST, Mar. 3, 1991, at C4.

<sup>237</sup>See Turner, *supra* note 236, at C4.

<sup>238</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 6.2.

<sup>239</sup>DA PAM. 27-161-1, *supra* note 123, ¶ 7-22.

<sup>240</sup>*Id.*

<sup>241</sup>MOORE, *supra* note 5, at 285 ("To meaningfully contribute to the deterrence of such crimes, the rule of law must impose genuine costs on their perpetrators.").

<sup>242</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ 6.2.

<sup>243</sup>MOORE, *supra* note 5, at 286-87.

<sup>244</sup>*Id.* at 287.

<sup>245</sup>*Id.* at 351.

<sup>246</sup>ARKIN ET AL., *supra* note 1, at 5.

<sup>247</sup>See Donna Abu-Nasr, *Winds Prolong Fires in Kuwait*, WASH. TIMES, Nov. 4, 1991, at 7; Thomas Y. Canby, *After the Storm*, NAT'L GEOGRAPHIC, Aug. 1991, at 2-4.

<sup>248</sup>THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note

153, at ii. There is some controversy as to the precise number of wells which caught fire. The WASH. TIMES reported that only 640 caught fire. See Abu-Nasr, *supra* note 247, at 7.

<sup>249</sup>Canby, *supra* note 247, at 5.

<sup>250</sup>See Abu-Nasr, *supra* note 247, at 7; Canby, *supra* note 247, at 2-4.

<sup>251</sup>Canby, *supra* note 247, at 2. Some of these pollutants settled as far as 1,500 miles south of Kuwait. *Id.*

<sup>252</sup>Ronald A. Taylor, "Blue Skies are Back" in Kuwait, WASH. TIMES, Nov. 5, 1991, at 1.

<sup>253</sup>Canby, *supra* note 247, at 2-3.

<sup>254</sup>John Horgan, *The Danger from Kuwait's Air Pollution*, SCI. AM., Oct. 1991, at 103.

<sup>255</sup>ARKIN ET AL., *supra* note 1, at 17.

<sup>256</sup>*Id.* at 16-17.

<sup>257</sup>*Id.* at 17.

<sup>258</sup>Abu-Nasr, *supra* note 247, at 7.

<sup>259</sup>Canby, *supra* note 247, at 2-4. In comparison, the *Exxon Valdez* spill was only about 260,000 barrels. Matthew Nimetz & Gidon M. Caine, *Crimes Against Nature*, AMICUS J., Summer 1991, at 8.

<sup>260</sup>Canby, *supra* note 247, at 4.

<sup>261</sup>*Id.* at 7.

<sup>262</sup>Jennifer Parmelee, *Kuwaiti Emir Snuffs Out Last Iraqi-Lit Oil Fire*, WASH. POST, Nov. 7, 1991, at A1.

<sup>263</sup>Canby, *supra* note 247, at 7.

<sup>264</sup>ARKIN ET AL., *supra* note 1, at 17.

<sup>265</sup>*Id.* at 18-19. *See also* Canby, *supra* note 247, at 2 (Thousands of military vehicles . . . have violently altered the soil structure).

<sup>266</sup>Taylor, *supra* note 252, at 1.

<sup>267</sup>Parmelee, *supra* note 262, at A1.

<sup>268</sup>*Id.*

<sup>269</sup>Donna Abu-Nasr, *Oil Fires Nearly Out; Harm Lingers*, WASH. TIMES, Oct. 30, 1991, at 10.

<sup>270</sup>Taylor, *supra* note 252, at 1.

<sup>271</sup>Deborah Hargreaves, *Towering Inferno is Quenched*, LONDON FIN. TIMES, Nov. 6, 1991, at 13.

<sup>272</sup>Samia Nakhoul, *Last Oil Fire out in Kuwait*, WASH. TIMES, Nov. 7, 1991, at 10.

<sup>273</sup>*Id.*

<sup>274</sup>Parmelee, *supra* note 262, at A1.

<sup>275</sup>*Id.*

<sup>276</sup>Nakhoul, *supra* note 272, at 10.

<sup>277</sup>*See* Taylor, *supra* note 252, at 1.

<sup>278</sup>See discussion *supra* part III.A.1.c.

<sup>279</sup>See discussion *supra* part III.

<sup>280</sup>See discussion *supra* part III.A.2.b-c(1).

<sup>281</sup>See discussion *supra* part III.A.2.b, c(2).

<sup>282</sup>See discussion *supra* part III.A.3.b.

<sup>283</sup>See discussion *supra* part III.A.3.c.

<sup>284</sup>This discussion will only focus on the flooding of oil into the Persian Gulf and the torching of the oil wells; however, incidental combat damage is subject to the same type of analysis. The determination of whether or not a particular act was justified by military necessity is a very fact-intensive inquiry. The detailed facts necessary to analyze these issues in much greater detail could not be located. It is remarkable that no source found contended that the dumping of the oil or the torching of the wells was justified by military necessity.

<sup>285</sup>*Iraq Invades Kuwait, Soldiers Surge into Oilfields*, BOSTON GLOBE, Aug. 3, 1990, at 1.

<sup>286</sup>OFFICE OF THE CHIEF OF NAVAL OPERATIONS, DEP'T OF NAVY, THE U.S. NAVY IN "DESERT SHIELD" - "DESERT STORM" app. A, 20 (1991) [hereinafter THE U.S. NAVY IN "DESERT STORM"]. On January 26, 1991, the spill from the Sea Island terminal had reached one hundred and twenty million gallons of oil. The pipelines feeding the Sea Island Terminal were

successfully bombed on January 27 by the United States to stem the flow. The flow from the Sea Island Terminal finally stopped on January 28, after dumping approximately 460 million gallons into the Persian Gulf. *Id.* app. A, at 21-22.

<sup>287</sup>*Id.* app. A, at 20-21.

<sup>288</sup>See Canby, *supra* note 247, at 3; *Saddam's Ecoterror*, NEWSWEEK, Feb. 4, 1991, at 36; *A War Against the Earth*, TIME, Feb. 4, 1991, at 32.

<sup>289</sup>Canby, *supra* note 247, at 4.

<sup>290</sup>See *id.* Had it not been for the Kuwaiti technicians who secretly closed valves unknown to the Iraqi soldiers and marked other closed valves open that actually were closed, the oil spill could have been three times larger. *Id.* Military necessity does permit environmental damage under certain circumstances. For example, during World War II the United States sunk the entire Japanese tanker fleet. However, in the vast and relatively clean Pacific Ocean of the 1940s, the environmental damage was only transitory. See Gwynne Dyer, *War, the Gulf and the Environment*, WASH. TIMES, Oct. 22, 1991, at F4.

<sup>291</sup>THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at 4.

<sup>292</sup>*Id.*

<sup>293</sup>*Id.* at 5.

<sup>294</sup>*Id.*

<sup>295</sup>THE U.S. NAVY IN "DESERT STORM", *supra* note 286, app. A, at 37.

<sup>296</sup>*Id.* app. A, at 38.

<sup>297</sup>See Abu-Nasr, *supra* note 247, at 7; Canby, *supra* note 247, at 2-4.

<sup>298</sup>See Canby, *supra* note 247, at 3; *Saddam's Ecoterror*, NEWSWEEK, Feb. 4, 1991, at 36; *A War Against the Earth*, TIME, Feb. 4, 1991, at 32.

<sup>299</sup>THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at 6.

<sup>300</sup>*Id.*

<sup>301</sup>Canby, *supra* note 247, at 5.

<sup>302</sup>Nimetz & Caine, *supra* note 259 at 8.

<sup>303</sup>THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at 4.

<sup>304</sup>SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS - GULF POLLUTION TASK FORCE, EXECUTIVE SUMMARY AND RECOMMENDATIONS, THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, at 5 (Mar. 5, 1992).

<sup>305</sup>THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at 75.

<sup>306</sup>*Id.* at 74-75.

<sup>307</sup>Luis Kutner & Ved P. Nanda, *Draft Indictment of Saddam Hussein*, 20:1 DENV. J. INT'L L. & POL'Y 91 (1991).



<sup>308</sup>*Id.* at 92-93, 95.

<sup>309</sup>LAWS OF WAR, *supra* note 9, at 384.

<sup>310</sup>Terry, *supra* note 3. at 64.

<sup>311</sup>*See* discussion *supra* part III.A.3.d.

<sup>312</sup>In considering the horrendous damage inflicted on the Persian Gulf region by Iraq, it is a sad comment on the mettle of the international community that even a year after the war the public crier has yet to call a court to order. However, it is unforgivable that Iraqi officials have not been held accountable for the unconscionable and incomprehensible human rights violations.

<sup>313</sup>*See* THE KUWAIT CRISIS, *supra* note 5, at 88-98.

<sup>314</sup>United Nations Security Council Resolution 670 (Sept. 25, 1990) [hereinafter U.N. Doc. S/RES/670 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 94-95; United Nations Security Council Resolution 674 (Oct. 29, 1990) [hereinafter U.N. Doc. S/RES/674 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 95-97.

<sup>315</sup>U.N. Doc. S/RES/674 (1990), *supra* note 314.

<sup>316</sup>The only authority within the United Nations to establish a war crimes tribunal is the Security Council. U.N. CHARTER art. 11, ¶ 2; MOORE, *supra* note 5, at 324 n.33.

<sup>317</sup>See United Nations Security Council Resolution 686 (Mar. 2, 1991), 30 I.L.M. 568 [hereinafter U.N. Doc. S/RES/686 (1991)].

<sup>318</sup>*Id.*

<sup>319</sup>But see Russell W. Goodman, *Think Twice About Trying Saddam*, ARMED FORCES J. INT'L, Apr. 1991, at 28 (But in forcing such trials would coalition leaders such as George Bush trample the sensibilities of people in that volatile region?).

<sup>320</sup>Moore & Turner, *supra* note 224, at 12. This article appears to be one of the first, if not the first, to highlight the importance for the world community to use the rule of law to punish Iraq and its leaders.

<sup>321</sup>MOORE, *supra* note 5, at 298.

<sup>322</sup>Jordan J. Paust, Remarks During a Panel Discussion, *The Gulf War: Collective Security, War Powers, and Laws of War*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 1, 14.

<sup>323</sup>Turner, *supra* note 11, at B2.

<sup>324</sup>Letter from Edwin D. Williamson, The Legal Adviser, U.S. Department of State, to Professor Robert F. Turner, Chairman, American Bar Association Standing Committee on Law and National Security (Aug. 23, 1991) (on file with addressee at the University of Virginia School of Law).

<sup>325</sup>*Id.*

<sup>326</sup>*Id.*

<sup>327</sup>See MOORE, *supra* note 5, at 298-299.

<sup>328</sup>See discussion *supra* part IV.B. See also MOORE, *supra* note 5, at 299.

<sup>329</sup>LAWS OF WAR, *supra* note 9, at 16.

<sup>330</sup>See MOORE, *supra* note 5, at 301.

<sup>331</sup>*Id.* at 302.

<sup>332</sup>*Id.*

<sup>333</sup>*Id.* at 303.

<sup>334</sup>See *id.*

<sup>335</sup>See *id.* at 304.

<sup>336</sup>*Id.*

<sup>337</sup>*Id.* at 304-05.

<sup>338</sup>*Id.* at 288.

<sup>339</sup>United Nations Security Council Resolution 666 (Sept. 13, 1990) [hereinafter U.N. Doc. S/RES/666 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 91-92; United Nations Security Council Resolution 667 (Sept. 16, 1990) [hereinafter U.N. Doc. S/RES/667 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 92-93; U.N. Doc. S/RES/670 (1990), *supra* note 314; U.N. Doc. S/RES/674 (1990), *supra* note 314; U.N. Doc. S/RES/686 (1991), *supra* note 317. See also discussion *supra* part VI.D.

<sup>340</sup>U.N. Doc. S/RES/674 (1990), *supra* note 314.

<sup>341</sup>See United Nations Security Council Resolution 661 (Aug. 6, 1990)

[hereinafter U.N. Doc. S/RES/661 (1990)], *reprinted in* THE KUWAIT CRISIS, *supra* note 5, at 88-89. An exception was made for payments "exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs." *Id.*

<sup>342</sup>Beres, *supra* note 235, at 134 n.23. The federal circuits are split on the issue of whether or not U.S. citizens have a private right to sue for violations of the law of nations. *Id.*

<sup>343</sup>Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), *noted in* Beres, *supra* note 235, at 134 n.23.

<sup>344</sup>See U.S. CONST. art. I, § 8, cl. 10; Beres, *supra* note 235, at 134 n.23.

<sup>345</sup>Marian Nash (Leigh), *Contemporary Practice of the United States Relating to International Law*, 86 AM. J. INT'L L. 109, 113, 117 (1992).

<sup>346</sup>*Id.* at 113, 118. The cognizance of the Compensation Commission was further delimited in Security Council Resolution 692. *Id.* at 118. Utilizing Iraqi oil resources for indemnification was first suggested just six weeks after the invasion. See Moore & Turner, *supra* note 224, at 12.

<sup>347</sup>Nash, *supra* note 345, at 118.

<sup>348</sup>Philippe Sands, Remarks During a Panel Discussion, *The Gulf War: Environment as a Weapon*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 214, 228.

<sup>349</sup>Nash, *supra* note 345, at 113-16.

<sup>350</sup>*Id.* at 114.

<sup>351</sup>MOORE, *supra* note 5, annex 8, at 497, 502.

<sup>352</sup>Nash, *supra* note 345, at 118.

<sup>353</sup>Richard C. Hottelet, *It's Not Too Late to Try Saddam*, CHRISTIAN SCI. MONITOR, Oct. 16, 1991, at 22. Saddam Hussein and the Iraqi elite are suffering little hardship. *Id.*

<sup>354</sup>Lee M. Katz, *Iraq Gets OK to Sell \$1.6 Billion in Oil*, USA TODAY, Oct. 16, 1991, at 10.

<sup>355</sup>Hargreaves, *supra* note 271, at 13.

<sup>356</sup>See Comment, *Punishment for War Crimes: Duty or Discretion?*, 69 MICH. L. REV. 1312 (1971).

<sup>357</sup>Geoffrey Greiveldinger, Remarks During a Panel Discussion, *The Gulf War: Environment as a Weapon*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 223, 224.

<sup>358</sup>*Greenpeace Wants to Outlaw Making War on Environment*, N.Y. TIMES, Mar. 11, 1991, at A9. Hereinafter the "Fifth Geneva Convention on the Protection of the Environment in the Time of Armed Conflict" will be referred to as the Proposed Geneva Convention No. V.

<sup>359</sup>Greenpeace International, "Round Table Conference on a Fifth Geneva Convention on the Protection of the Environment in Time of Armed Conflict," Mar. 1991, at 1-2 (conference announcement).

<sup>360</sup>Greenpeace International, "Greenpeace Calls for a Geneva Convention for the Environment," Mar. 1991, at 1 (press release).

<sup>361</sup>See discussion *supra* part III.B.2.a.

<sup>362</sup>See discussion *supra* part III.B.2.a.

<sup>363</sup>See discussion *supra* part III.C.1.

<sup>364</sup>See *supra* note 4 and accompanying text.

<sup>365</sup>Greenpeace International, *supra* note 359, at 1.

<sup>366</sup>Greenpeace International, *supra* note 360, at 2.

<sup>367</sup>Sebia Hawkins, Remarks During a Panel Discussion, *The Gulf War: Environment as a Weapon*, 1991 PROC. OF THE 85TH ANN. MTG. OF THE AM. SOC'Y OF INT'L L. 220, 221.

<sup>368</sup>See Colonel Terry's conclusions *supra* note 3.

<sup>369</sup>See *supra* note 5.

<sup>370</sup>Antoine Bouvier, *Protection of the Natural Environment in Time of Armed Conflict*, 285 INT'L REV. OF THE RED CROSS 567, 570 (Nov.-Dec. 1991).

<sup>371</sup>MOORE, *supra* note 2, at 83.

<sup>372</sup>*Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, Supp. No. 1, U.N. Doc. A.37/1 (1982), reprinted in NATIONAL SECURITY LAW, *supra* note 193, at 287, 290.

<sup>373</sup>1949 Geneva Convention No. IV, *supra* note 70, art. 146. The

following common provisions of the other three 1949 Geneva Conventions also impose the same duty: 1949 Geneva Convention No. I, *supra* note 222, art. 49; 1949 Geneva Convention No. II, *supra* note 222, art. 50; 1949 Geneva Convention No. III, *supra* note 222 art. 129.

<sup>374</sup>Hottelet, *supra* note 353, at 22.

<sup>375</sup>Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991), *noted in* Benjamin R. Civiletti, *Preliminary Report to the House of Delegates*, 1991 A.B.A. TASK FORCE ON AN INT'L CRIM. CT. 3.

<sup>376</sup>Civiletti, *supra* note 375, at 3.

<sup>377</sup>*See* discussion *supra* part IV.

<sup>378</sup>*See* LAWS OF WAR, *supra* note 9, at 9.

<sup>379</sup>*See id.*

<sup>380</sup>*See* Stuart H. Deming, Committee Insights, *International Criminal Law*, INT'L LAW., Vol. 25, No. 4, Winter 1991, at 1105.

<sup>381</sup>*See generally* Civiletti, *supra* note 375.

<sup>382</sup>*See* Deming, *supra* note 380, at 1105.

<sup>383</sup>*See id.* at 1106.

<sup>384</sup>*Id.*

<sup>385</sup>*Id.* at 1106-07.

<sup>386</sup>A detailed discussion of these options, and their respective advantages

and disadvantages, is far beyond the scope of this paper. A tremendous number of issues, such as court composition, jurisdiction, procedural rules, applicable law, and enforcement mechanisms, are involved in the creation of an international criminal court. An even more complex topic is the political facets and complications of each option. These variations are listed and discussed briefly in this study to give the reader an overview of the available options.

<sup>387</sup>See discussion *supra* part IV.B for a discussion of the authority of the Security Council to create an international criminal court.

<sup>388</sup>An investigative committee was set up under the Charter of the International Military Tribunal for Nuremberg to serve as the prosecutorial arm of the court. See 1945 Charter of the IMT, *supra* note 213, arts. 14-15.

<sup>389</sup>Turner, *supra* note 11, at B2.

<sup>390</sup>Dan Balz, *President Warns Iraq of War Crimes Trials*, WASH. POST, Oct. 16, 1990, at A19.

<sup>391</sup>*Id.*

<sup>392</sup>See *supra* part IV for a discussion of the historical basis and legal authority for the creation of a tribunal by the coalition forces.

<sup>393</sup>Uniform Code of Military Justice art. 18, 10 U.S.C. § 818 (1982).

<sup>394</sup>COMMANDER'S HANDBOOK (SUPP.), *supra* note 25, ¶ S6.2.5.3 & n.74.

<sup>395</sup>Uniform Code of Military Justice art. 21, 10 U.S.C. § 821 (1982).



<sup>396</sup>18 U.S.C. § 3231 (1982).

<sup>397</sup>See Paust, *supra* note 322, at 1, 13, 15; Henfield's Case, C.C.Pa. 1793, Fed.Cas. No. 6,360 (The federal judiciary, in the absence of legislation by Congress, has jurisdiction of an offense against the law of nations, and may proceed to punish the offender according to the forms of the common law).

<sup>398</sup>U.S. CONST. art. I, § 8, cl. 10.

<sup>399</sup>U.N. CHARTER art. 94, ¶ 2.

<sup>400</sup>D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 227 (1963).

<sup>401</sup>See U.N. CHARTER art. 96, ¶ 1.

<sup>402</sup>THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR, *supra* note 153, at v.